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DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JOHN LAUDER OF FOUNTAINHALL

SUMMER SESSION.—June, 1673.

THE Commissioners to the Parliament for West-Lothian, alias Lithgowshire, (it was Sir Walter Seaton and James Dundas of Morton,) having charged the heritors holding of his Majesty, liable to them (and who are very few there, and not exceeding six or seven,) for payment of the charges and expenses payable to them for their service and attendance at the last Session of Parliament, in 1672, conform to the acts of Parliament; the said heritors were resolving to suspend upon thir grounds, that, albeit, it might be pretended, (and that not without some shadow of reason and probability,) in this shire, and those others who came but over their doors to hold the Parliament, that they ought to have no allowance at all; seeing that must be supposed to be given upon the account of the trouble, and more than ordinary expense they were at in being absent from their own homes, and to hold out a rank with, for the grandeur of the kingdom, and the honour of that part which they represented, and in compensation of the damage and loss they sustained in their affairs, by reason of the said necessary abstraction and diversion: which thir commissioners could not pretend to; seeing they might both attend, and be few nights out of their own houses: yet they would not controvert that with them; only they were well founded upon the acts of Parliament, to see no more than what was justly due, either craved or exacted; and, therefore, the said charge behoved to be suspended till the Commissioners, in the terms of the 35th act, in 1661, shall produce to them a testificate, under the Clerk of Register's hand,* attesting the

* My Lord Lauderdale was so huffed at this Session of Parliament, in 1673, that they say he discharged the Register to give out any letters of horning to the Commissioners that served at that Parliament for their fees; and let them that pleased pursue it by way of action.

time and days of the Parliament; for, 1*mo*, These days wherein the Parliament did not sit, there can be nothing paid for them. 2*do*, If it shall appear any of the Commissioners were absent any of these Session days, there is no reason they should have anything allowed them for that time. 3*tio*, Where the said act of Parliament seems to allow them something to carry their charge in going home or coming back, there is no need of it here; seeing they can either go to Edinburgh from their several interests, or return in two hours' time; which deserves no consideration. And yet the 18th act, 1641, allows the Commissioners of the Sheriffdom of Edinburgh, for their coming and going, one day's pay, which is 5*l.*; but that act is rescinded, except in so far as is revived by the act in 1661, which passes over that part of the act 1641, and sundry other articles of it, in silence. As for that point, whether or no they should get allowance for each individual day, from the sitting down of the Parliament to its rising, without adverting to its session, or no session; if as to this effect, the time of the Parliament must be computed to be *tempus continuum*, (as is done to the King's Commissioner,) or only *utile*, seems somewhat dubious; for though it would appear hugely reasonable, that it should only be understood of sitting days; yet the same reason would dictate, especially in behalf of those who come from some distance, that their trouble, their charge, and loss of their private business, is the same, as well the not sitting days as the sitting; seeing they cannot retire during the interval to their own homes: and which being occasioned for their shire and constituents' interest, their maintenance ought to be upon their score; seeing *officium nemini debet esse damnosum.*

Advocates' MS. No. 388, *folio* 215.

1673. *June* 1. ANENT THE SUMPTUARY LAW REGULATING APPAREL.

THIS day being the first day of the Session, and the day at which the sumptuary act regulating our apparel took its beginning, and the Lords having little or nothing else ado, and many of them inclining to gratify the merchants of Edinburgh, so far as was possible; they fell to consult and debate if the said act prohibiting all clothes made of silk stuffs to be worn by any except the privileged persons, reached to farandains; which are part silk, part hair. It was fiercely urged by Halton, that they were undoubtedly comprehended under the prohibition; else the law should be so far from attaining its design, that it should be easily mocked and eluded; for as it was notourly known to have been made to bridle our exorbitant prodigality and needless expense we were profusely run to, so it is as notour, farandains being once allowed promiscuously to all ranks, we shall be worse than ever; seeing they are as dear, and of far shorter last than other silks. 2*do*, Farandains being a heterogeneous body, wherein silk makes both the noblest, preciousest, and the greatest part; the same, *jure accessionis*, must draw the hair, as the lesser and more ignoble, to its laws, and must give the denomination to the whole. And so the hair, being swallowed up as an accessory, can enter into no consideration here; but the stuff must be reputed silk, *ab eo quod est in illo potentius.* Vide parag. 26, et seq. Instit. De rerum divisione, ibique Vinnium. Vide l. 24 et seq. D. De acquir. rerum dominio; l. 23, p. 2*do*, et per totum, D.

De rei vindicatione; l. 19, p. 13. D. De auro et argento legato; et l. 30 D. de usurp. et usucapionibus; l. 7, p. 2. D. Ad exhibendum.

On the other hand, it was reasoned, That statutes were *strictissimi juris*, and we were not to disced from their letter, neither were they to be screwed up or extended by a notional equity or pretended parity; that they being composed of disparat materials, they could not be truly termed silk stuffs, nor fall under the compass of a prohibition laid upon silk stuffs; that in the law of accessions the most precious thing was not ever the principal.

This deliberation took no result or conclusion; only I have observed the most part of people to have ventured upon moyhairs, which wants not its own difficulty and danger, till the ambiguity be removed. But to be convinced how raw and ill contrived that act is, in causing a multitude of doubts, see in the animadversions upon that sumptuary law beside me.

Advocates' MS. No. 389, *folio* 215.

1673. *June* 2. LADY WAMPHRAY *against* The LAIRD.

THE Lady, with concourse of sundry of her friends, having raised a Reduction against her own husband, and his brother Sheins, and others, his friends, of her contract of marriage and disposition of her estate, whereof she was heretrix to him, by reason of minority and lesion; it was objected, she could pursue no actions without the concourse of her husband, much less he opposing them, and, least of all, actions against himself; that women, because of the fragility and shamefacedness befitting their sex, were, by the law of God, of nature, and of the Romans, and the municipal laws of all other nations, *in manu, potestate, et custodia, vel patris vel mariti,* and were *sub perpetua eorum tutela vel cura;* and being married, had no more *personam standi in judicio* without their husband, than a pupil or a minor had without the authority of his tutors or curators interposed. Yea, *Gellius, Noctium Atticarum libro* 10, *cap.* 23, tells us, that *vir* was *mulieri judex*, out of Cato. And *Bodinus*, p. 25, *De Republica*, cites the same Cato persuading the Oppian Law to the people, for reviving the power of husbands, for having their wives *in perpetua tutela. Maritis reverentia est exhibenda, l.* 14 *D. Soluto matrimonio.* See *Calvinum, in Lexico, ad verbum* Uxor. Charron on Wisdom, 2, *cap.* 46, *p.* 170.

It was ANSWERED, That *regulariter* the husband must indeed concur in all the wife's judicial actings, yet he being naturally bound to assist her in all her lawful pursuits, if he shall refuse, the Lords, in such an emergent, or in other singular cases and special considerations as they see just, will ordain him to concur, and in case of refusal, authorize her by herself. And which is no novelty, but marked by Dury and Hadington to have been done on the 9th of January, 1623, Marshell *against* Zuill; yea, Dury at the 13th of July, 1638, tells us, the Lords granted inhibition to the Lady Glenbervy against her husband; and the same Dury in a case exactly parallel with ours, at the 8th of July, 1642, Inglish *contra* Aitkit, observes, The Lords sustained process at a wife's instance against her husband, for reducing her contract of marriage, *ob minoritatem*, he reclaiming and disowning the same

Neither is this our law only, but also the practice of France, as Hadinton shews at the foresaid decision. And as for that allegeance, that the husband is perpetual curator to his wife, the same is false; seeing it appears, *ex parag. penult. ibique Vinnio, Instit. De Excusationibus tut. et curat,* that is only when she is within age.

The Lords repelled the allegeance, and sustained process at her instance against her husband; only appointed her a *curator ad hanc litem,* to concur with her. Craigie wrought mightily for her. See her Information beside me. *Vide* Stair's Practiques, Tit. *Of Marriage.* No. 10.

Advocates' MS. No. 390, *folio* 215.

1673. *June.* CAPTAIN GILLEIS *against* GERBRAND CLAES.

IN the beginning of June, (about the 11th of it,) 1673, fell to be debated this point, If causes could be advocated from the Admiral Court to the Lords; upon this occasion: One Captain Gilleis, craving adjudication before the Admiral against Gerbrand Claes, skipper of the Bounder, a ship so called, brought up by him; the Admiral, before answer, allowed a conjunct probation, and granted a commission for examining some persons in foreign parts. The pursuers raise an advocation thereof to the Lords, upon the ground of iniquity. Against which it was objected, That the Lords could not advocate such a case from the Admiral, who was sole judge competent *in prima instantia;* yea, was supreme and independent, and a sovereign Court, and subaltern to none;* and that it was so designed in our acts of Parliament, particularly by the 15th act of the Parliament, 1609; and that this was not only our custom, but the practice of all nations in their Courts of Admiralty.

To which it was ANSWERED, That it was beyond all controversy but the Lords of Session were, in all civil matters, sovereign to all the civil Judges in Scotland, and, consequently, to the High Admiral, maritime causes being civil; so that if he should either err through ignorance, or commit iniquity by partiality, no doubt causes may be advocated from him before sentence, or may be suspended and reduced after sentence. And that appeal lies from them to the Lords of Session, appears evidently from the 12th act of Parliament in 1661: where also they seem to be ranked with other inferior courts; likeas, their actings are in the same way quarrellable as the Sheriff's decreet in perambulations may be, though by act of Parliament, the Sheriffs are sole judges to them in the first instance. Also, in some cases, decreets of the Commissioners of Plat are subject to the Lords' review and jurisdiction. Yea, Hope, in his Title of the Session, folio 131, tells that the Lords judged a spulyie committed on the sea *in prima instantia,* though the Admiral reclaimed, and only permitted him to sit and vote with them. And in Holland, where is the best regulated Admiralty in the world, trading being the

* The law of our country has very rationally provided a remeid from this Court, because the Judge has the tenth part of all found prize. Which argument W. P. makes use of, that if it were not conscience led him to assoilyie, he has more advantage by adjudging; but they answer this very easily, that the pensions or bribes he has from Holland, to free their ships, compenses his tenths ten times.

way they rose, and by which they must stand; that Court judges sovereignly and without appeal, where the sum in dispute is within L.50 English; but if it exceed the same, it may be carried from them to the States General and their Council; as William Aglonby, in his Present State of Holland, p. 138, lib. 2, cap. 18, tells: so that it appears that Court is not everywhere incontrollably sovereign.

The Lords inclined to find, that if the Judge-Admiral commit iniquity, they may and will advocate from him: and though they were clear enough in it, yet out of respect to the said Court, they, without passing the advocation, ordained the cause to be debated upon the bill, which was a passing it upon the matter; as also found that he assumed too much power to grant commissions before answer to both parties for a mutual probation: both upon the account that court should be summary, and not delay strangers or seamen by such tedious interlocutors; as also, because, though the Lords themselves practised the same frequently *ex nobili officio*, it was not proper nor competent to others to venture upon it, especially W. Pringle, but that they should astrict themselves more to form. Which was a strain of vanity to appropriate that method of procedure to themselves. See the informations of this cause beside me.

Advocates' MS. No. 391, *folio*, 215.

1673. *June.* ROBERT FAW and LORD LINDSAY *against* FOTHERINGAME of Poury and LORD BALMERINO.

IN an action pursued by Robert Faw and my Lord Lindsay *contra* Poury Fotheringame and my Lord Balmerino, the following case fell to be debated, Whether or no bye-gone non-entry duties be due to the superior's executor, or to his heir, or any other singular successor standing infeft in the right of superiority. It was not questioned, if the superior had obtained a decreet of special declarator of non-entry in his own time, but then the same became moveable, and fell under his executry; but all the doubt was, where he died, the same being undeclared: in which case it was contended for my Lord Lindsay and his donatar Faw, that they transmitted to the heir and singular successor; because none could pursue the declarator but allenarly one who stood infeft in the superiority, and could give entry to the vassal, which did not quadrate to the executor; that the superior had no *jus perfecte quæsitum* to these obventions and casualties of superiority, before declarator; and, before that, they are *jus individuum*, and not seperable from the right of superiority itself, and so must be carried with it, aye till they be declared, before which time they cannot be properly said to be *in bonis defuncti Superioris*.

To which it was ANSWERED, that the superior, during the non-entry, was *loco proprietarii*, and the non-entry duties came in place of the mails and duties of the lands; and, therefore, as the mails and duties owing before the vassal's decease fall under his executry, so must thir non-entry duties fall under the superior's: and seeing it is not controverted but they are so conveyed after declarator, the analogy of law will dispose of them in the same manner before it; seeing a decreet of declarator alters not *jus debiti*, the nature of the debt, and it is as well due before as after, else it could not be declared in his favours: that the casualty of ward

(betwixt which and non-entry in this case there is no imaginable disparity) falls to the superior's executor; *ergo*, that thir duties would fall under his escheat; *ergo*, are moveable: that all annual prestations after the term is elapsed at which payment should be made are moveable; as bye-gone annual-rents, feu-duties, tack-duties, &c. and thir non-entry duties are of the same kind, *Ergo*—

See a very full and learned reply to this in the Informations beside me.

The Lords found these bye-gone duties, never being declared, belonged to the heir and singular successor: which many judged disonant to the analogy of law.

As for the instance brought from the casualty of ward, I was stumbled by a resolution I found marked by Hadington in his practiques at November, 1609, *No.* 31, in a debate betwixt the Earl of Argile and the Laird of Ardkinlas; where it was thought a gift of ward and marriage undeclared fell to the donatar's heir, and not to his executor. And Craig, page 68, speaking of the same question, is very unclear; only insinuates as if what was due in right of the ward before the superior's decease appertained to his executors, and the rest to his heir.

In this action of Lindsay's, there were other two things controverted; the first was, that Lindsay's seasine was null, because not registrate, neither in the general register, nor in the particular of that shire where the lands about whose non-entry they were disputing lay. ANSWERED, they were registrate in the particular register of Fyffe, within which these lands lay; at which, by a dispensation contained in his charter, seasine was ordained to be taken, and to stand sufficient for the whole. REPLIED, that dispensation gave no allowance for this way of registration.

The next point was, the pursuer being forced to restrict his summons to the retoured duty for all years and terms preceding the citation in his declarator; after that he craved the full mails and duties of the lands, and cited a decision in a case of Sir Jo. Harper's, where the Lords found it so. The defender alleged, that he could acclaim nothing but the retoured mail till he should obtain a decreet, after which indeed they confessed the full mails and duties would be due; and alleged a practique between the Earl of Argile and the Laird of M'Claud, wherein the Lords, that same very Session, had so determined it.—See them in the Informations.

Advocates' MS. No. 392, *folio* 216.

1673. *June.* Sundry BARONS, &c. *against* The LORD LYON.

ABOUT the same time, in June, 1673, I heard of a process some Barons and Gentlemen had intended against my Lord Lyon, to hear and see it found and declared that he had done wrong in refusing to give them forth their coats of arms with supporters, whereof they and their predecessors had been in possession past all memory, and never quarrelled till now; and, therefore, that he might be decerned to immatriculate them so in his register, and give them forth an extract; conform as is provided by the late act of Parliament in 1672. The Lyon's reason is, because, by an express letter of his Majesty's, none under the dignity of a Lord must use supporters. (He grants them now to some who were in possession of them of old.)

But the gentlemen answer, that Lords at the beginning having been only Barons, and in regard of the considerable interest they had in their respective shires, being commissionate from the small barons and freeholders to represent them in Parliament, they, because of that credit, got first the denomination of Lords, without any patent or creation; and, upon the matter, were nothing but Barons: and so what is due to them is also due to the other, they originally not differing from the rest by any essential or superior step of dignity. So Craig, pages 78 and 79.—REPLIED, whatever was their rise, the other Barons have clearly acknowledged a distinction now; in so far as they have renounced their privilege of coming to Parliaments by the 113 act in 1587; and the distinction being made, and their privileges renounced, by the small Barons in the Parliament 1427. DUPLIED, that act is introduced in their favours, and nowise debars them; but allenarly dispenses with their absence, and the penalty they incurred thereby, &c. The Gentlemen found on the *Interdictum uti possidetis:* the Lyon says, it is but *vetustas erroris*, and an usurpation.

The complainers are the Lairds of Dundas, Halton, Polmais, &c.

Advocates' MS. No. 393, folio, 216.

1673. *June.* JAMES RAE *against* ALEXANDER GLASSE of Sauchy.

IN the same month of June, there was an action of count and reckoning pursued by James Rae against Alexander Glasse of Sauchy; wherein Sauchy having produced a bond for 7000 merks, granted by the same James to Marion Rae his niece, now spouse to Sauchy, and to which he had right *jure mariti*;—Against which it was alleged, that the said bond could found no debt against him, because it bears this express quality,—" providing always the said Marion marry with my consent," and which he never gave:—

ANSWERED, the condition and quality was sufficiently purified and fulfilled; in so far as he was present at the marriage, and is a subscribing witness in the contract of marriage, and staid fourteen years in their house after the same.

REPLIED, where a consent is positively and expressly required to the constitution of an obligation, it must be specially adhibited, and must not be inferred upon presumptions, as that of being present, or a witness; that he never gave his consent to it, and, if he had, they would have taken him subscribing as consenter in the contract; that he never trysted nor communed, but was only witness therein *tanquam quilibet e populo.*

DUPLIED, that his simple presence (though he had not subscribed, as he has done) was sufficient in this case to import a consent, and it is enough he declared no dissent nor dissatisfaction; nor had he any reason, the parties being equal, and without any disparage, and with whom he staid after. And, which is sufficient in the marriage of children, that the father dis-assent not. *L.* 7, 12, *et* 13, *D. de Sponsalibus.—L.* T. C. *De filiis-familias, et quemadmodum pro his pater teneatur, lib.* 10.

The Lords found the quality satisfied by his presence and subscribing *witness*, and that the same was equivalent to a solemn and formal consent. Which seems agreeable to that practique marked by Dury at the 26th of July, 1631, Bishop of

the Isles *contra* Shaw; but there is a contrary decision observed by him at the 19th and 28th of July, 1625, Walwood *contra* Tailzeor; and Mascardus, there cited. It might have been likewise urged for Sauchy, that all these clauses which restrict the liberty of marriage are reprobated in law. Which see debated *supra*, No. 306. [20th January, 1672.] See also No. 365, [10th July, 1672;] and the Informations of the cause beside me.

Advocates' MS. No. 394, *folio* 217.

1673. *June.* JOHN BEATON, Minister of Ayton, *against* HIS PARISHIONERS.

IN the action pursued before the Commissioners for Plantation of Kirks, by Mr John Beaton, minister at Ayton, *against* his parishioners, for making up that proportion of his stipend which was evicted from him by Mr Thomas Ramsay, minister at Mordington, out of the lands of Lammerton; there being a great quantity of free teinds in the said parish of Ayton, and the heritors disputing amongst themselves who should bear the burden: the Lords inclined to find, and that upon most just grounds, wherever an augmentation is granted to a minister, such heritors as have the right of other men's teinds shall be *primo loco* liable before any who have acquired the right of their own teinds shall be burdened therewith. And which interlocutor was upon the occasion of the deceased Lord Renton, who had many teinds besides his own; and which, being an odious purchase, deserves no favour in law.

Advocates' MS. No. 395, *folio* 217.

1673. *June.* ——— *against* ———

ONE having charged for a tocher upon a contract of marriage, the same was suspended, upon this ground; that, by the same contract, the husband was bound to employ a certain sum, upon sufficient security, to himself and his wife, in liferent and conjunct fee, and to the bairns of the marriage in fee; and which is not yet done; and till that obligement and condition of lying so much foregainst it be fulfilled, the tocher cannot be paid; at least, they must be fulfilled *simul et semel.* Pitmedden says, that the Lords suspended the letters aye and while the charger fulfilled his part, as in correspective obligations, and employed the sum conditioned by him conform to the obligement of the said contract. *Vide* a like case *supra* at No. 321, [Laird of Balnamoon *against* Macintosh, 9th Feb. 1672.] Yet this may prove very hard to exact of merchants, to cause them to give out their stock (with which it is far more their interest to trade,) upon annualrent, so destined and clogged.

Advocates' MS. No. 396, *folio* 217.

1673. *June.* KINLOCH *against* ——

MANNA KINLOCH, spouse to James Charteris, writer, being convened before the Lords of Secret Council, for breaking the sumptuary act regulating apparel, two points fell to be spoken of; but were not debated, because she was assoilyied through lack of probation. The first was, Where a married woman is convicted of the breach of a penal statute, what the effect of the same is in law: if it can extend to her husband to make him liable in the fine; or if it will allenarly operate to punish herself in her person, by imprisonment, or in her goods, at the dissolution of the marriage. I think it ought not to burden the husband: else many wives, to affront their husbands, or otherwise be avenged on them, would break it of purpose. But see this point fully debated at my observes upon the said sumptuary law, [*supra*, 1st June, 1673.] See also the 5th Act in 1670. The second thing was, If the transgression of that act was probable by women; for, being at a rouping where she was noticed, there were few others save women observed her. It seems contrary to law to find it so probable; for, albeit they admit women to be witnesses in *puerperio*, anent the vivacity of children when born, for carrying the tocher, yet an absolute necessity is the cause of the singularity there; because, if they rejected women, they should never prove it, it being an act transacted commonly by women alone, and none else present; but regulariter they are not receivable, except it be, 1*mo*, In scoldings and small riots; 2*do*, In crimes of the highest nature, as treason and witchcraft. See Mr Norvell's opinion on this, *alibi apud me.*

Advocates' MS. No. 397, *folio* 217.

1673. *June.* ROBERT DEANS *against* ——

A CHARGE, given by Mr Robert Deans, advocate, upon a bond, being suspended, on this ground, that the bond was null, because vitiated *in parte substantiali, videlicet*, the sum; it being clear, by ocular inspection, that 100 merks was made 800 merks; for which reason, the Lords annulled the bond *in totum*, and would not so much as sustain it for the 100 merks, which was confessed by all to have been the true sum contained in the bond *ab initio*; and that *in pœnam falsi*. Though we say *utile per inutile non vitiatur*, and especially if the charger was an assignee, and not *particeps fraudis*. *Vide* something like this, *supra*, No. 362. [19*th July*, 1672, *Jack* against *Jack*.]

Advocates' MS. No. 398, *folio* 217.

1673. *June.* BIRNIE *against* CRAWFURD.

BIRNIE and Crawfurd competing in a double poinding for a sum which both of them had arrested, Crawfurd craved to be preferred, in regard he had arrested first. (*Vide Cavalcanum de Testibus, p.* 39, *et* 67, *et* 68.) Birnie contended, that

though he was posterior in arresting, yet he had prevened the other in diligence, and was pursuing to make forthcoming; whereas Crawfurd had done nothing on his arrestment.

REPLIED, that, beside his arrestment, he had also an assignation to the same sum from the creditor in it, who was their common debtor, and that he conjoined his two titles. (*Infra No.* 492, § 6.) [July, 1676.]

DUPLIED, his assignation was of no value, being after the arrestment laid on by the duplier; and two imperfect and invalid titles could never be joined in prejudice of him who had a right, and had done diligence, preferable to any of them *separatim.*

The Lords preferred him who had the two titles, though apart they were lame, *ut quæ non prosunt singula, multa juvant.*

Many doubt if this was well decided, seeing as M'K. in his pleadings, page 61, has it, weak arguments conjoined can, by their mutual assistance, never astruct a right, no more than many cyphers can make a number, or many uncertainties a certainty. (Yet many beams of light may make a perfect light.) *Omnino, vide* Taylor in his *Ductor Dubitantium, lib.* 1, *cap.* 4, *p.* 91.

Facit lex unica, C. Qui numero tutelarum se excusant, l. 15, *par.* 11, *D. De excusationibus tutorum. Vide tamen, l.* 5 *et* 6, *C. de probationibus;* from which commentators infer the conjunction of divers sorts of probation. *Vide Vinnium Selectarum Quæst.* 44; *L.* 28, *p.* 3, *D. ex quibus causis majores; l.* 27, *C. de testamentis, cap.* 18, *extra, De probationibus; cap. ultimo, extra, De successionibus ab intestato.*

Advocates' MS. No. 399, *folio* 217.

1673. *June.* ANENT CERTIFICATIONS.

IN certifications, it is undoubtedly a good defence, that the writs craved to be produced, either in a reduction or improbation, are in the pursuer's own hands; and Hadington shows that it was so found in an improbation pursued by the Laird of Corstorphin against the Old Lady Corstorphin, at the 16th of December, 1609, No. 80.

Advocates' MS. No. 401, *folio* 218.

1673. *June.* MARGARET HOME *against* MARGARET SMITH.

IN an action of reduction pursued by one Margaret Home against one Margaret Smith, for reducing of a disposition of some lands in Dunce made to the defender, this reason was mainly insisted on, That the said disposition was, by act of Parliament in 1621, null, being made to a conjunct person, (*videlicet,* to the granter's sister-in-law, whom the common law æquiparats to brothers and sisters in this case,) without any onerous cause, in defraud of lawful creditors and their diligences. *Vide l.* 27, *C. De Donationibus.*

ANSWERED, The act of Parliament 1621, by confident persons, means only fathers, brothers, and sons, and not brother and sister-in-law, and such remote degrees; neither does the civil law æquiparat them in this case.

(Yet the Lords have found brothers-in-law confident persons, which is just our case here; *See Dury, 23d March*, 1624, *Duff* and *Kelly*: but did not find an uncle and nephew so; *28th January*, 1625, *Levinston*.)

REPLIED, That this were to open a door to all fraud and collusion; and that, by the common law, the prohibition that is in consanguinity, either for marriage, diction of testimony, &c. is extended to all the same degrees of affinity, the affection being oftimes the same.

The Lords ordained the defender to condescend upon the onerous causes of her disposition; notwithstanding that it bore to be granted for onerous causes, in which cases strangers are never burdened with any farther probation: so that upon the matter the Lords inclined to find her a conjunct person.

See M'Kenzie's observes on the act of Parliament 1621, page 66, where they found her a conjunct person.

Advocates' MS. No. 402, *folio* 218.

1673. *June.* ANENT NON-ENTRY DUTIES.

IT is reported the Lords have found in an infeftment of annualrent, where the destination runs thus, the granterto pay annualrent as well not infeft as infeft; in that case the non-entry mails are only the blench or feu-duties. The reason whereof appears to be, because the creditor can ascribe what he has got to the said personal obligement, and not to the real right; but if it want that clause, then the annualrent, according to the received practique, being in non-entry, *valebit seipsum*. But our custom may deserve correction, where, upon a nicety of law, an annualrent falling in non-entry is entirely due to the superior, whereas equity seems to ordain that the superior's interest here should be no other than in other non-entries; all of them being unfavourable, and to be restricted. See more of this *alibi*.

Advocates' MS. No. 403, *folio* 218.

1673. *June.* DR ARCHIBALD STEVINSONE *against* The EARL OF TWEDALE.

DOCTOR ARCHIBALD STEVINSONE, pursuing (as executor to his father Mr A. Stevinsone, minister at Dunbar) the Earl of Twedale, as representing the deceased Earl, his father, upon one or other of the passive titles, for payment of his proportion of the stipend due for the lands of Beltane, for the year 1630: ALLEGED, He nor his father could never have been liable for that year, because the teind, yea, the stock itself, was wasted by the calamity of war, and the English their incoming that year, and lying about Dunbar.

ANSWERED, That he having pursued the Earl of Roxburgh for some stipend

owing by him for the same year, he had proponed the very same allegeance; and it was repelled by the Lords, who found where the minister was only a stipendiary, and no beneficed person, though the teind be wasted by calamity of war, or other accident, that did not liberate him who had right to the said teinds, because that loss might be compensed and supplied by the uberty of preceding or subsequent years; and which is the reason assigned by the law, wherefore tenants can plead no abatement upon the head of sterility or vastation. *L.* 15, *p.* 4, *D. Locati*; *L.* 8. *et* 18, *C. eodem.*

The Lords adhered to their interlocutor given in Roxburgh's case.

Advocates' MS. No. 404, *folio* 219.

1673. *June.* ANENT COMPRISINGS.

IN an action for maills and duties at the instance of a compriser, it fell to be contended, that a first compriser having arrested, and by virtue thereof obtained payment of his annualrents, he was bound by the act of Parliament 1661 (declaring second apprisers within year and day to come *pari passu*, and to be reputed a part of the first comprising, as if but one apprising had been led for all their sums,) to communicate proportionally what he had so got to the said apprisers within year and day. (And yet the intent of the act of Parliament 1661 may be eluded easily, if their diligences were proper.)

It was not decided. Only it seems he ought to communicate nothing, save what directly and immediately flows from his comprising. What if he has attained payment, in whole or in part, by virtue of some other right he was necessitated to acquire, or by an inhibition he had served on his bond, or by confirming executor creditor? Sure posterior creditors apprisers should claim no share in that as common; *nam sibi vigilavit; meliorem suam conditionem fecit; jus civile vigilantibus scriptum est; non revocatur id quod precepit*; *L.* 24, *p.* 1, *D. Quæ in fraudem creditorum facta sunt, ut restituantur.*

Advocates' MS. No. 405, *folio* 219.

1673. *June.* STREET and JACKSON *against* MASON.

IN the action pursued by the English merchants, Street and Jackson against Mason, the case was, James Mason, elder, merchant in Edinburgh, having, in 1665, granted heritable bonds to thir two Londoners for L.1000 sterling, whereon they were infeft in his lands of Howboot and Gayside; they pursued a poinding of the ground. In which action compearance was first made for my Lord Torphichen, superior, his donator to Mason's liferent escheat, who craved to be preferred.

ANSWERED, That Torphichen having received the said Mason's son vassal in the said lands, and he being publicly infeft before his father's rebellion, he could not thereafter, as superior, gift his liferent escheat of these lands, whereof the father, who became afterwards rebel, was denuded by a resignation, accepted by the said superior, in favours of his son, and whereon infeftment was taken by the son.

The Lords found, that after he had received the son, he could not gift the liferent escheat of these lands as befalling to him by the father's rebellion.

Then my Lord Torphichen himself compeared, and as a creditor of the said Mason, and having apprised his right for sundry considerable sums of money, craved to be preferred. The Lords allowed Torphichen to propone, upon the right made to Mason the son, what he could to exclude thir pursuers, and they would receive the same. Whereupon the said Lord ALLEGED, That the son being publicly infeft in the lands controverted, in 1662 long before thir pursuers' bonds for infefting them in an annualrent, and he being lawful creditor to old Mason before he disponed in favours of his son, he had reduced the son's right upon the act of Parliament 1621; and so he behoved to be preferred to thir pursuers, whom the son's right would eternally exclude, being long prior to their bonds and debts. *Si vinco vincentem, te—&c. Vide* Dalzeel against Tenants of Caldwell, June 1673.

REPLIED for the pursuers, That they had reduction and declarator of nullity depending of the son's right, as of a most gross and fraudulent contrivance in prejudice of them: for albeit their bonds were of a date posterior to the son's right, yet they bore to be granted for merchant-ware which was furnished before; and so depending upon an antecedent cause, it was sufficient to give them preference to the son's right; they having entered before into a public and stated trade and correspondence with old Mason, and by the result, product, and currency whereof, he was debtor to them in the foresaid great sums.

Upon this debate, the Lords, by an act in July 1669, sustained the said bond for a sufficient title and interest whereupon to reduce the son's infeftment though prior to the same; they proving always the said bond to have been granted for merchant-ware furnished by them to old Mason, preceding the son's right. Whereupon probation having been led, and a condescendence and report at length given in, it appeared that old Mason, the time of his son's infeftment, stood debtor to thir pursuers allenarly in L.49 sterling, for prior merchant-ware got by him from them; and, consequently, that this bond now pursued on is for merchant-ware furnished since the date of the son's right: and, therefore, it was alleged, that the Lords having gone the utmost length in favour to thir pursuers, strangers, by their interlocutor, and wherein the pursuers having succumbed, they must be assoilyied from their said reduction, except *in quantum* they have proven, L.49 sterling of prior furnishing.

But upon a bill given in by the pursuers, they were allowed a hearing *in presentia;* where they ALLEGED, that, *esto*, they could not make it appear that the furnishing for which the bond now pursued on was granted or made before the son's right, but was truly after the same, yet the said right could not be sustained in their prejudice: but they, upon their bond, had a good and sufficient interest to quarrel and reduce the same, because the son's right was after a begun and stated tract of correspondence and trade betwixt thir pursuers and old Mason; of which constant and uninterrupted correspondence and traffic, both before and after the son's infeftment, this bond was the result: and which trade varied; sometimes Mason owed them more, sometimes less; at other times nothing, having satisfied them, either in money, security, or ware. Yet the payment of the former furnishing was, in effect, a foundation of new trust for the future. And which continued tract of correspondence and bonds granted thereupon, must, and are in law, considered, with respect to their dependence upon the beginning of the said correspondence, *tanquam suam causam quoad hoc*, to question and impugn any fraudulent infeftment in prejudice of the interests of the

persons who are so stated, and have entered in such a public trade. And the interest of which trade would be considered, that by such detestable unheard-of contrivances, merchants may not be encouraged to draw the means of other honest persons, their correspondents, into their hands under trust, and then betwixt the payment of the old debt and the contracting of the new, to put their children and wives in their estates by fraudulent deeds: which will subvert and destroy all trust betwixt merchant and merchant, violate the law of nations, and draw ignominy and reproach upon our country. But, *ita est*, thir pursuers acted and dealt *bona fide* with old Mason, upon the faith, assurance, and credit of that public trade and correspondence was begun and settled betwixt them before the son's infeftment, and continued the same thereafter without any interruption. And though the act of Parliament 1621 allows such alienations only to be granted at the instance of creditors whose debts were contracted before the alienation questioned, yet this case is no breach, no invasion on the said act; but a just, a rational, and a necessary interpretation thereof, and a most just extension of it; whereby thir pursuers, in all law and conscience, must be holden and reputed as anterior creditors, their bond depending on an antecedent cause; viz. a clear, fixed, and stated trade, prior to the fraudulent conveyance made to the son; and their debt being the result and product of a correspondence entered into long before the son's right. That the said act of Parliament appoints these deeds to be quarrellable, as they are by the civil and canon laws. But so it is by the civil law, *Actio Pauliana seu revocatoria (recissoria) eorum quæ fiunt in fraudem creditorum*, the same remedy with our reductions upon the act of Parliament 1621, was competent to posterior creditors, even to reduce dispositions and rights made before the contracting of their debts; if so be they were made *animo fraudandi*, and their means and estates engrossed to purchase and acquire the same: and which is the very case here; he having, in all probability, paid the price of thir lands wherein he has so fraudulently put his son, with thir pursuers' means. And as the seller would have had good interest to have reduced the son's infeftment upon the said act 1621, if he had been unpaid of the price; so may thir pursuers crave to annul the son's infeftment, at least, to have it burdened and affected with their debts for the same cause. That *actio Pauliana* was competent *etiam futuris creditoribus*, appears, *ex l.* 10, *p.* 1; *l.* 15 *et* 16, *D. Quæ in fraudem creditorum. Cæterum si illos dimisit quorum fraudandorum causa fecit, et alios sortitus est, siquidem simpliciter dimissis prioribus quos fraudare voluit, alios postea sortitus est, cessat revocatio; si autem horum pecunia quos fraudare noluit priores dimisit quos fraudare voluit, Marcellus ait, revocationi locum esse, &c.* And Jason and Sueidivinus, *ad par.* 6 *or* 7 *Institut. De Actionibus*, tell the particular presumptive cases wherein posterior creditors are supposed defrauded, and, therefore, may pursue *actione Pauliana*. But all of them fall short of this cheat here. He gives it to a son, a pupil, *in familia*, who had no means of his own to acquire it; he gives it without the least reservation, either of his own liferent, or of any power to affect and burden the same with his debts, or any reversion: notwithstanding of all which, he does all the deeds of a proprietor, and ever retained the possession, and conceals the son's infeftment, that his very neighbours knew nothing of it; neither could the registers learn them any thing, seeing the son is only designed there, *Ja. Mason*, which is also the father's name. That the bond depending *ex causa præterita*, is good enough to give them an interest. That the act of Parliament anent the prescription of merchant accounts has regard to a stated and continued correspondence, and does not proceed in that case but only from the last year of the furnishing; and that there is much

more reason to advert to the beginning of the correspondence here. That bills of exchange are sustained obligatory, without the solemnity of witnesses; and orders for payment of them, though not intimated, are preferred to posterior assignees and arresters: and annualrent is sustained between merchant and merchant, without paction, &c., and all upon that exuberancy of trust which is the sinew and foundation of trade. And any extension now sought in favours of the pursuers, is every whit as warrantable and just as any of these; here the public honour and justice of the kingdom, and the security of trade, being absolutely concerned.

Whereunto it was REPLIED, that the son's right can never be quarrelled by Jackson, because no tract of trade between old Mason and him prior to the son's infeftment, but the said correspondence, is clearly proven to have commenced since between them. As for Mr Street, it is contrary to all law, and to the express tenor of the act of Parliament 1621, to allow him who was not a creditor the time of the said right, now to question the same: and the said act cannot be stretched nor extended to this case in hand by any save only the King and the Parliament in a new law. Neither is there any inconvenience to trade here, because the faith and trust betwixt merchants, especially in several kingdoms, is not founded upon any real estate in the merchant's person, but upon their faith and personal credit abstracting from their real estates: else, if the foundation of trust between them were in contemplation of real estates, then no merchant, after he had begun a stated trade, could give any valid provision to his daughters or youngest children, but it might be questioned; which were absurd. And as for the *actio Pauliana*, *Bartolus* begins his commentary upon that *lex* 10, with this rule, *Creditores futuri non habent revocatoriam*. *2do*, Though the Roman law allowed that remeid to posterior creditors in some cases, yet there was good reason for it there, which ceases with us, *videlicet*, that they had no means to know the debtor's condition, or prevent the hazard of latent and fraudulent rights, which, *ex l.* 19, *D. de R. Juris*, he was bound to know; but with us public registers are established for that. *3tio*, The Roman law allowed this remedy to posterior creditors, under sundry restrictions: 1*mo*, if the former was dismissed and paid with their money, in which case the law judged it but equal to bring them in their place, *ex natura subrogati*: *2do*, where the receiver of the disposition was *fraudis particeps*, upon that excellent ground of law, *quod nemo debeat lucrari ex suo dolo;* but *ita est* the receiver here is acknowledged not to be *doli capax*. But, *3tio*, As there was no fraud upon the receiver's part, so there was none upon the granter's, because at that time he was not thir pursuers' debtor. *4to*, A right is only presumed fraudulent where it is done *clam et remotis arbitris:* but this right was most public, being on resignation, &c. And, certainly, if such an action as this had been sustainable, there had been many of them intented before now; the case frequently occurring: and a negative custom on an express law, where the case did offer, is very well founded.

DUPLIED,—As for that pretence that there is *dispar ratio* between the civil law and ours, because we have registers to discover men's condition by, which they wanted; and, therefore, thought it just to help posterior creditors against prior deeds, which might be so latent as they could not know them; whereas that cannot fall out with us if they be real rights:—it is answered, that registers are only introduced for farther security, and do not derogate from any remedy allowed by the common law, and founded on natural reason and evident justice, as this is. *2do*, Even by the common law, *insinuatio donationum* was requisite, and which was judicially done, and an act more

solemn than our registers; and yet if any such donation had been made, a posterior creditor had power to quarrel the same: and so their registration hindered not the natural equity of this remeid. *3tio*, As for that pretence, that to give posterior creditors an interest there must be not only *animus fraudandi* in the granter, but the receiver also must be *conscius fraudis;* the same is a false, ignorant, and ridiculous assertion: for any who has read the Paratitles on that place will find, that the law uses a most rational distinction, *videlicet*, if the alienation be *ex causa onerosa*, then it cannot be questioned, unless the receiver was also *particeps fraudis;* but where it is *ex causa mere lucrativa*, (as this was,) then *fraus in eventu sufficit* without *animus fraudandi:* and which is agreeable to our practique.

Vide l. 6, *p.* 11, *D. et l.* 5, *C. Quæ in fraudem creditorum, &c.* See the full debate in the Informations beside me.

The Lords found the pursuers to be in the case of anterior creditors, in the interpretation of law; and, therefore, reduced the right made to the son, upon the act of Parliament 1621, and found it fraudulent, and to fall under the compass thereof; and in regard of the unhandsome conveyance made by the father, conform to the said act 1621, (though it was not craved by the pursuers,) they declared him a bankrupt, infamous, and incapable of all office of trust, &c.

This decision was mightily applauded as equitable by all, for discouraging cheats: only it seemed to be a very licentious discession from the letter of the act of Parliament. Street was so overjoyed with it, that he vowed he would have the whole fifteen Lords canonized, and that nothing pleased him so in their sentence as that they had declared him infamous. Thus, the son's right being annulled and taken out of the way, the pursuers and my Lord Torphichen will fall next to debate upon their own several interests.

Advocates' MS. No. 407, *folio* 220.

1673. *June.* Bailie ROBERT LERMONT *against* WILLIAM BROWN, The INCORPORATION of the SKINNERS of Edinburgh, and Others.

THE said Robert Lermont, being to rebuild a waste tenement he had acquired in Skinner's Close, obtained from the Council of Edinburgh, after a visitation appointed by them, and a report thereon, an act giving him liberty to oversailyie the close, having both sides thereof, and cast a transe over it for communicating with both his houses, as also, for building fore-stairs alongst the said close; and after he had proceeded a pretty length in his building, a suspension was put in by William Andersone, William Brown, the Skinners, and the other neighbours in the close, of the said act and warrant, and for stopping his building. And the Lords having ordained them to be heard upon the bill, they ALLEGED, 1*mo*, The said act behoved to be suspended, because only the Dean of Guild Court, and not the Council of Edinburgh, were competent judges to such questions, *in prima instantia.* 2*do*, The neighbours were not heard nor cited, as uses and ought to be. 3*tio*, The ground whereupon the council granted him the said liberty, was frivolous and unjust, *videlicet*, that none of thir complainers had any servitude upon his tenement, and, therefore, he might raise it *ad cœlum* if he pleased, though it should damnify their lights: because the passage of the close is common to all the heritors there;

and as he could not encroach or build upon the street of the close, so neither can he oversailyie; seeing that is directly to appropriate to himself that void which is common, and whereby the houses of the close receive their light, and will diminish all their rents upon that account. And for stopping such encroachment there needs no servitude: but in that case that just maxim of the law takes place, *in re communi potior est conditio prohibentis*, and every neighbour who is prejudged may stop and oppose. (*Per l.* 9, 11, 14, *et* 24, *D. de Servitutibus urbanorum; L.* 8, *p. aristo;* 5, *D. Si servitus vindicetur; L.* 8, *C. de Servitutibus.*)

ANSWERED,—What he has done is *authore prætore;* (*vide l.* 28, *D. De communi dividendo;*) and what they crave is invidious, and only *in emulationem vicini.* They have no prejudice, but the town is decored. As to the first, the council, if not more, are every quite as competent as the dean of guild, and their power is cumulative. (*Vide Hayning and the Town of Berwick's pleading.*) To the second, though they needed not call the neighbours, yet they were cited, and were present. To the third, it is a mistake to say, a simple interest in a common passage in a close is sufficient to hinder an oversailyie; seeing all it can import is, that the passage be preserved as convenient as before, and which is done by the height of this trance and oversailyie; and without they can condescend upon some eminent prejudice, or a servitude they have, they cannot stop it; and the axiom *In re communi* is not applicable here, seeing the *res communis, videlicet,* the common passage, is not wronged nor encroached on, and for inconsiderable prejudices to light, the council has power to gratify a neighbour, notwithstanding thereof; and as for the gable lights, they are never allowed in Edinburgh to interrupt a building.

REPLIED,—Their inconveniencies and prejudices are very great and palpable; for not only does he stop their lights, and make their houses both unwholesome and unpleasant, taking away that benefit of the sun which God hath given both to the just and unjust, and deforms the beauty and regular symmetry of the city, but also closes up William Brown's gable lights, and would introduce, without any right, a servitude *tigni immittendi* upon him; and all, forsooth, that is objected to palliate thir enormities is, that there is a liberty and faculty allowed by the law to all persons to build upon their own ground *ad libitum et arbitrium,* he owing no servitude; whereas, the lawyers do state that *servitus altius tollendi* rather to be *naturalis libertas quam servitus,* yet all do understand that natural privilege and faculty *cum mica salis, videlicet,* that *licet prædio dominanti meliorem facere conditionem prædii servientis, non autem deteriorem.* And so in Hayning's case with the town of Berwick, your Lordships, without considering that illimited and universal liberty *re sua utendi et abutendi,* inclined to the legal, just, and natural restrictions put thereupon; and therefore ordained the material prejudices done by letting out the said loch, to be condescended on, and would have accordingly determined. And this unbridled licence of building and heightening, in all well regulated commonwealths and cities, is retrenched, without any need of a servitude. And so it was used in Rome, where, by law and consuetude, they had a general gage of height appointed for all houses within burgh, and a reciprocal and mutual servitude amongst all the inhabitants, *ne altius tollatur;* both that there might be an uniformity in houses, and no deformity in the city, by the superbity of some edifices and lowness of others; as also, that no man might prejudge his neighbours, by building higher than was appointed by the law. See vestiges of this in *L.* 11, *D. de servit. urbanorum; l. pen. p.* 1, *C. de ædificiis privatis. See Vinnius ad par.* 1, *Instit. de Servit. et p.* 3, *de actionibus.*

The Lords, after they had nominated two of their number to visit the ground, they found by their report no such prejudice, and therefore adhered to the act of council, and found their opposition ill grounded.

Robert Lermonth lived but about eight days after the gaining of his cause.

Advocates' MS. No. 408, *folio* 221.

1673. *July* 3. Mr Alexander Seaton of Pitmedden *against* Sir Jo. Forbes of Craigievar.

Pitmedden, as *executor ad omissa* to his goodsire, pursues the Laird of Craigievar, as heir, and upon the other passive titles, as representing his father, to pay to him the sum of 500 merks, and the annualrents thereof, because old Craigievar was bound to his goodsire to cause one Burnet assign him to a bond of 500 merks owing by Seaton of Disblair to him.

Answered,—He was content to fufill the obligement in the terms of his father's bond, and to assign the pursuer to that bond.

Replied,—He could not be heard to purge his *mora*, and make that offer now, because Craigievar's father was boundto cause him assign betwixt and such a day, which he had never done, and the debtors, in the interim, had become bankrupt and irresponsal; so that an assignation was altogether unprofitable now, *et res non erat integra:* and therefore he behoved to pay the sum, *loco rei imprestabilis et interesse, nomine damni et moræ;* likeas, this defender has acquired the debtor's estate, and sold it, and so may the more fairly pay his debt. *Vide L.* 4, *p. ult. D. ad legem commissoriam; l.* 12, *C. de contrahenda et committ. stipulatione;* which gives an excellent reason for it.

Duplied,—Craigievar was not *in mora*, because never *interpellatus* and required to ant the same. *2do*, The very obligement bears, that the bonds and other writs appointed to be assigned to, were delivered up to old Pitmedden at that time; and so, the writs being in his own hand, *sibi imputet*, and he was *in culpa* not to offer them, that an assignation might be drawn thereby: and the impossibility of granting an assignation now, or the ineffectualness of it, was through the pursuer's and his goodsire's own fault, in not *debite* seeking it, or giving the papers, &c.

Triplied,—The obligement being *ad diem, dies interpellabat pro homine*, and there needed no other interpellation. *2do*, Having given up the writs where to he was to procure an assignation, the law presumes he retained a double of them to draw and form them by; at least, having bound himself to obtain an assignation to them, notwithstanding of the upgiving of them, the law binds him to have required the same to frame the writs by; and which having neglected, find him *in mora*, and therefore liable in the sum. *Argumentum desumi potest ex l.* 53, *D. de fidei commissariis libertatibus.*

The Lords found, notwithstanding of the delivery of the writs, Craigievar was *in mora* through not granting or obtaining of the said assignation, and that Pitmedden was not bound to interpell him for the same. *Vide supra, numeris* 47 *et* 58.

Advocates' MS. No. 409, *folio* 222.

1673. *July.* ANENT OBLIGATIONS.

It was questioned between two parties, Where there is an obligement *specifice* conceived to deliver a bond or other paper, if the party obliged will be liberated by offering a decreet proving the tenor of that paper; and if such pactions can be fulfilled *per æquipollens*, where the specific performance is imprestable, as here by the loss of the paper; and if the said tenor proven is a full and equivalent implement.

The Lords doubted much to receive it. Yet, *argumento* of the 37th act in the Parliament 1555, we may rationally think this is a maxim of our law, *contractus qui non potest impleri in forma specifica, potest suppleri per æquipollens:* and that very act refers us to the common law, which holds the same, *arg. l. 3, C. de Institutionibus et substit.* See also 18th February 1609, *Abercorne.*

Advocates' MS. No. 410, *folio* 222.

1673. *July.* ANENT ARRESTMENTS.

It was questioned amongst the Advocates, how money could be arrested in a minor's or pupil's hands, especially if he wanted tutors or curators; and when he had them, in whose hands the same was to be laid on. Sir George Lockhart thought, if he was a pupil, it behoved to be in the tutor's hands allenarly, especially where he was *intra infantiam, id est septennium, per l.* 18, *C. de Jure deliberandi;* because tutors act and administrate as principals, *et gerunt personam pupilli,* whereas, after pupilarity, the minor becomes principal, and the curators only consent; and therefore, after fourteen, it behoved to be in the minor's hands: but in both cases, in the pursuit to make forthcoming, the tutors and curators ought to be called: yet that the curators might be cited by a general citation at the market-cross where the minor resides; but where he wanted tutors or curators, then the bill of arrestment behoved not to pass in the ordinary form, but upon special knowledge of the Lords, that they may either authorise him or dispense with the same.

It was also doubted, how we could arrest in the hands of him who was out of the country; and if he had factors or commissioners established, if it would be legal enough to arrest in their hands. But I think it safest that the bill pass upon special notice of the Lords, and bear that the party is out of the country; and the Lords will grant letters of supplement for doing of the same. *Vide supra, No.* 310, *24th January* 1672.

Advocates' MS. No. 411, *folio* 222.

1673. *July.* JAMES GIBSONE *against* the HIGH CONSTABLE.

ONE James Gibsone, a baxter in Plaisance, having been fined for a pretended riot in eightscore pounds in the Constable Court, during the sitting of the Parlia-

ment in August 1672; he suspended the same upon thir reasons. 1*mo*, That being constable of that bounds, he was *in excercitio officii et actus maxime liciti*; and being opposed by a drunken wife, to put in a poor person, who was dying, into a house, he put her by, and she fell over, and that this was all the riot. 2*do*, Upon the sense of his innocence, he had obtained a discharge of the said decreet and fine from Mr John Hay and Mr Alexander Seaton of Pitmedden, the two constable-deputes; and opponed the same.

REPLIED,—That the High Constable Court seemed to be sovereign the time of Parliament, and it was *res mali exempli* to have their decreets canvassed or questioned by the Lords. However, to the first, they opponed the decreet. As to the second, the discharge was null, because granted by those who had no power, seeing after they had pronounced sentence they were *functi officio;* and by the commission of deputation they had no right to the fines or emoluments of courts, likeas the deputes in other courts had not the amerciaments, but they belonged to their constituents; and here my Lord Erroll had since their discharge assigned this same very fine to James Hay, clerk to that court.

DUPLIED,—*Per l. 37, D. de R. Juris,—Qui condemnare potest, potest etiam absolvere;* and this upon the matter was an absolvitor more than a discharge; that they had no other salary but the fines, and so might dispose upon them; that my Lord Erroll's assignation was truly posterior to the discharge, but is antedated; and that judges might discharge thir obventions as appertaining to themselves, was clearly decided by the Lords, as Dury remarks, on the *26th of November* 1633, *Lindsay*.

Only it was not decided here, because the matter being referred to my Lord Craigie, he called for the probation which was the ground of the decreet, and when he heard nothing proven, he with indignation rejected it. And, really, there was much cause of complaint given to the citizens of the town against that court, not only for being so summary and illegal, but also for their exorbitancy and oppression in their fines. And though the town has ever contraverted this privilege with the High Constable, so that he never possessed any jurisdiction within Edinburgh, peaceably and pleasantly, yet he gained a greater step that session 1672 than ever he could arrive at before, by judging Johnston, the fiddler, and sentencing him to death for killing of his wife; whereas, in so long a tract of time as the ages since he laid claim to that privilege, he could never afford one instance save of one. I believe it was one Reid, a painter, for killing one Allan Walwood, servant to my Lord Cranstonriddell, whom, for slaughter, they had sentenced to die about the year 1640, but he obtained a remission.—See it in the Criminal Register.

Advocates' MS. No. 412, *folio* 222.

1673. *July.* JO. FORK *against* WILLIAM FYFFE.

JO. FORK, writer in Paislay, having pursued William Fyffe there, before the Commissary of Glasgow, for calumniating him, in having called him a mensworn man, and to get him punished by fining, and to restore him to his good name: of this cause Fyffe raised an advocation; at the calling whereof, he insisted on this reason, that the Commissary had committed iniquity in repelling an unanswerable defence, viz. that he behoved to be assoilyied from that action of scandal, be-

cause it was *res hactenus judicata*, in so far as he having been already pursued before the Bailies of Paislay, at the Procurator Fiscal's instance, for these injurious words, he was assoilyied, in regard he proved to the assize what he had reproached Fork with to be true, and that he had perjured himself in sundry depositions; *nam veritas convitii excusat a convitio.*

ANSWERED,—1*mo*, *Non apparet*, that the Commissary has repelled that defence, and so, *non apparet* he has done any iniquity. 2*do*, If he has repelled it, he has done most justly, because the said decreet-absolvitor was contrived, patched up, and carried through, by collusion, *moris, et dicis tantum gratia*, of purpose to assoilyie Fork; the party injured compearing, and utterly disclaiming the said pursuit; likeas, the Bailies of Paislay, mean persons, and in a burgh of barony, were no way competent to a matter of so high importance as perjury, and one of them as sib to this Fyffe. 3*tio*, They proceeded *spreto mandato judicis superioris, videlicet*, of the Commissary of Glasgow, who, conform to the power given them by the injunctions, sent and discharged them to proceed in a matter of scandal which was consistorial; and which charge they contumaciously disobeyed. 4*to*, All that is vindicated by this decret is only the *actio pro vindicta publica*, which was *res inter alios acta quoad* Fork; and therefore his action and private resentment of the wrong done to him, being distinct from that done to the public, remains yet entire. (*L.* 18, *in princ. D. de Injuriis. Vide infra, folio* 312, *Monteith against Stitts*, 18*th December*, 1677; *item* 24 *July*, 1678, *Mr William Weir and Calander.*) As for the depositions whereupon that decreet-absolvitor is founded, the same are of no force or moment to infer any such odious crime objected against Fork, or even to assoilyie Fyffe, as if he had had some probable ground wherefore to think and call him mensworn; because the same are not subscribed by him, nor the judge, nor clerk, nor any other at his command. As to the axiom, *veritas convicii, &c.* it is false where the same is objected extrajudicially, *ingeminat animo injuriandi vel calumniandi*, or are such delicts and crimes as *non interest reipublicæ [illegible]re*; which is Fork's case.

Yet, *videtur interesse reipublicæ perjuria manifestari et detegi. Vide l.* 5, *C. de Injuriis; l.* 2. *C. Quando et quibus*, 4*ta pars*; *L.* 3, *C. de officio rectorum prov. Vide Harprecht, ad par.* 1 *Instit. De Injuriis, No.* 98, *et seq. item, No.* 114, *ubi semiplena criminis probatio a calumnia excusat. Vide Tho. Grammat, Decisiane* 37.

REPLIED,—That the Bailies of Paislay were very competent judges, because a burgh of regality; as was found in their debate with my Lord Dundonald, where, amongst sundry other privileges, they carried the election of their own magistrates. And though the probation led in that decreet-absolvitor was not sufficient, in law, to fix the guilt of perjury, and prove the same upon Fork, and which they used not for that end, yet it was good enough to assoilyie Fyffe from any action of verbal injury for calling him mensworn; and that the more it was rubbed up, it became the more noysome.

Having got the Lords' answer upon this debate, they remitted it back to the Commissary without any expenses: only recommended him to take care of Fyffe's defences.

Advocates' MS. No. 414, *folio* 223.

1673. *July.* SIR ALEXANDER HAMILTON of Hags, *against* FAIRLY.

SIR ALEXANDER HAMILTON of Hags, having sold some woods to one Black for 10,000 merks, one Fairly becomes cautioner in the contract for the price. Black, the principal, turning bankrupt, Hags charges Fairly, the cautioner, for 1218 merks, which, by an account fitted between him and Black, appeared to be yet owing. He suspends on this reason, that Hags, the charger, finding Black falling, he had taken a disposition of his own woods back again from Black, and by virtue thereof had intromitted with much more than that remainder of the price now charged for.

ANSWERED,—He had indeed got a disposition of some of them, and had intromitted, but it was in payment and satisfaction of some other sums Black was owing him beside this, and for relief of cautionaries he stood engaged in for him far above the value of any intromission he had by that disposition. And that he had deponed in thir terms before the Sheriff of Lanerk; being pursued by this Fairly, suspender, to grant him a discharge of this cautionry, because the said price (as he pretended) was all now paid: and so it is *res hactenus judicata.*

REPLIED,—That whatever was between Hags and Black, Black, the principal, could never invert the possession he had acquired for himself and his cautioners, by assigning it back to Hags; but Hags his intromission therewith must ever, in law, be ascribed and interpreted in payment of the price of these woods, for liberating the cautioners; and Hags can never be allowed to attribute the said intromission to any other cause of debt; and the subject matter out of which the price was to be paid returning to his own hand, the same, in all law and reason, must ever be, *primo loco,* liable and affected with that debt; the woods being that which naturally was to afford the price, and therefore could be misapplied to no other use till that was first satisfied, especially by the creditor retrocessed to his own place by a collusion betwixt him and the principal, to the evident defraud and prejudice of the cautioner.

The Lords inclined to sustain the reason of suspension; yet, before answer, ordained Hags to produce the said disposition, if he had it; and if not, then to depone upon the tenor of it, and if one of the causes thereof was not for satisfying what remained of the price of the woods.

Advocates' MS. No. 415, folio 224.

1673. *July.* LORD FORBES *against* ———

MY Lord Forbes pursues a reduction, *ex capite inhibitionis,* of an eke to a wadset; ALLEGED, he cannot quarrel the said eke, because the pursuer, as superior, has granted a confirmation of the said wadset, since the eke; *et quod semel approbâsti non licet amplius reprobare.*

ANSWERED,—These are *penitus disparata,* to confirm a wadset, and crave to reduce an eke. *2do,* It is an absolute inconsequence to argue from any person's deed, as superior, to their other actings; for as superior they refuse none, yea may be forced

to receive vassals: and therefore the common acts which they do under that reduplication as such, can never prejudge them of any rights that are competent to them as creditors or otherwise. And thus, lately, in the case betwixt my Lord Torphichen and Ja. Maison, younger, the Lords found Torphichen, as a creditor, had interest to reduce Maison's right and infeftment, though granted by himself as superior. And really the same is most just and consonant to law, by which *actus agentium non operantur ultra eorum intentionem.* And where a superior granted charter of an irredeemable right, without mentioning the right of reversion he then had, it was found not to prejudge his right of reversion; as *Dury* marks, *20th March*, 1635, *Bishop of Glasgow against Mauld.*

I heard not if this was decided; but I think it ought not to hinder my Lord Forbes from quarrelling the eke, that he had confirmed the wadset.

Adocates' MS. No. 416, *folio* 224.

1673. *July.* The LORD LYON *against* ALEXANDER FORBES, of Auchintoull.

MY Lord Lyon pursuing declarator upon a gift of recognition of the lands of Auchintoull; ALLEGED, the right made by Alexander Forbes to Ja., his son, of these lands, can infer no recognition; because it is to his apparent heir, and who is *alioqui successurus.* 2*do*, For the base infeftments granted by Ja. to sundry persons, far beyond the worth of the lands, neither can they infer recognition; because only granted by Ja., who was never the king's vassal, but was infeft base holden of his father.

ANSWERED,—Though the infeftment given by the father to the son can be no ground of recognition, yet those made by the son must be as good a ground for it as if they had been made by the father, who is the King's immediate vassal, to strangers; because the fee goes, by this, *extra familiam vassalli*, and the vassal becomes unable, in construction of law, to serve the superior: else a compendious way shall be laid for frustrating all recognitions; the father shall infeft his son base, and he shall alienate without acknowledging the superior: which were most absurd; for the superior's interest shall be evacuated, himself contemned, and the vassal disabled to perform the services prestable by him to the superior: and it should be all one to the superior whether the fee be transmitted immediately to strangers by the vassal, or first to his son, and then by him to strangers; contrary to the solid and just maxims of law, *Quod directo non licet, nec per ambages fieri potest.* This is a pretty question.*

Advocates' MS. No. 417, *folio* 224.

1673. *July.*

A CAPER having rescued a Scots merchant ship which had been seized on by some Dutch caper, it fell to be questioned, whether or no, *jure postliminii quod obtinet*

* In July 1674, the Lords found the alienations made by the son, though he was only infeft base, were a ground of recognition.

in rebus bello captis, the former private owners and merchants of the said ship, so brought up and rescued, could lay any claim to the same. Wherein it was ALLEGED for the caper, that the said vessel having been in the custody and power of the enemy by the space of twenty-four hours before they recovered her out of their hands, the same was *jure gentium* absolutely and irrevocably become the victor's and enemy's: and the owners, (whose right was *in pendenti* during the said space,) had utterly fallen from their right; and they having supervened and retaken her, she was become fully theirs: and the old owners had no claim or interest in her, unless they could say she was retaken before she was twenty-four hours in the enemy's possession, and which is a kind of prescription.

ANSWERED,—That Grotius, *lib. 3, de Jure Belli et Pacis, cap. 6, No. 3, et cap. 9, No. 14*, who sees as far into these affairs as any, (and many other lawyers are of his opinion,) is positive that the enemy does not acquire the dominion and property of things taken, till the other has lost all probable hopes of recovering them; and which is not till they be brought within their castles, forts, harbours, and other stations for ships, or where their whole fleet is; *nisi intra præsidia navalia, portus, fines imperii, aut eum locum ubi tota classis se tenet, perductæ sint;* but so it is, this ship was not brought to their own country or *præsidia*, and therefore it still remained theirs, the recovery of it not being desperate till then.—*See Joannes Voet, de Jure militari, cap. 5, pag. 286.*

REPLIED,—The same Grotius, in the place cited, as also Loccenius, *de jure maritimo, lib. 2, cap. 4, de jure postliminii*, affirms, By the universal consent of nations, *spatium 24 horarum* is determined for the time after which they become irrecoverably the taker's, and so must appertain to them who have retaken them from them.

Advocates' MS. No. 418, folio 224.

1673. *July.*

ONE having charged upon a bond, there was a suspension thereof raised upon this reason, that the said charge was most malicious; and given only because the suspender debtor in the bond offered in the payment of the annualrent, to retain one of six, conform to the benefit introduced in his favours by the 4th act of Parliament, in 1672. Whereupon sundry of the Lords, especially the Chancellor, President, Strathuird, &c. greedily drew in the debate, Whether the exacting of the whole six during the retention, or the taking the said full annualrent, when offered by the debtor voluntarily, and refusing to use that privilege, be lawful, yea or no; or if it can in any construction of law be reputed usury, to the effect they might get the same decided to be unlawful.

It was ALLEGED,—That though the creditor could not seek it, yet where his debtor was content to give it, he might take it, because there could be no usury, and we had no such thing unless where a statute decided or declared it; but so it is, the said act, 1672, allenarly ordains, that every debtor, for the space of one year, have retention of a sixth part of their annualrents; and which act being conceived in their favours, they might renounce the same. That it was against the ingenuity of lawgivers, and the interest of the lieges, to forge and invent crimes, where there was none; or to make acts of Parliament snares and gins wherein to catch innocent

persons, or to stretch laws by cruel consequences beyond their words, upon the pretence it was the meaning of the legislator. *L.* 29, *C. de Pactis.*

ANSWERED,—The act of Parliament 1672 speaks not *verbis permissivis* (may retain), but *imperativis* (shall retain), *et legis est jubere; L.* 7*a*, *D. de Legibus et Senatus-consultis;* and therefore debtors cannot renounce the same, unless there had been an express salvo, empowering them so to do, as is in the act 62, between debtor and creditor, in 1661; *et pactis privatorum non potest derogari juri publico. L.* 38, *D. de Pactis.* That to adhere to the word is *adhærere cortici*, and that the strength of the law stood in the sense, design, and purpose of the law-makers. *Scire leges non hoc est verba earum tenere, sed vim et potestatem, l.* 17, *D. de Legibus;* and therefore, whatever frustrates and evacuates the intention of the law, though it keeps the words, it defrauds and circumvenes the law as much as that which directly contravenes the same. *In fraudem legis facit, qui, salvis verbis legis, sententiam ejus circumvenit; l.* 29, *et* 30, *D. eodem.* But if the taking of six off the hundred shall be allowed in any case whatever, then the said act appointing retention shall signify nothing; for creditors, though they will not directly threaten, yet they will use such insinuations to their debtors, of their dissatisfaction if they shall retain that off them, and that they shall make it out of their way, that there shall never a debtor retain what the law has permitted him to do. Likeas, all the acts that ever hitherto, in this kingdom, ordained a retention in annualrents, did ever declare that the receiving the whole annualrents, without the said allowance and deduction, should be usury, as will appear by the 17th act of Parliament in 1647; and therefore, this act 1672, being copied of these as the pattern, must be in the same manner understood.

REPLIED,—That all laws and statutes were *stricti juris*, and the drawing them *de casu ad casum* was not allowable; that it was confessed if a creditor should offer to infuse the least insinuation or inclination to have it, that then he should be punished as an usurer and one who oppressed the lieges, and craved to exact more interest from them than they were bound to pay; but where a debtor had so much regard to his honour as not to catch hold on so miserable and naughty advantages, there was no law could hinder the creditor from taking it. That the act 1647 was *funditus* rescinded with the authority that made it; that these times of rebellion were not to be made use of as patterns of our policy now; and yet that the argument drawn therefrom is retorted; for if, in that act 1647, it needed a special clause to declare the taking the full annualrent should be usury, then it can be none here, because, in the act 1672, that clause is omitted, and it must be presumed to have been done of purpose; and none doubts but if this question had been started in Parliament, when the said act passed, but they would have found it to have been no usury; and the truth is, none seemed to doubt it at that time, and the resolutions of all lawyers did run for the lawfulness of it. And if the lords should find, by the meaning of the said act, that it might not be taken by creditors, the most that can reach to is only future payments; seeing what has been already paid or received *bona fide*, and upon the faith of that law, (which at best is but dubious,) can never be now called in question or revoked.

The Lords FOUND, whatever creditor had taken his full annualrent before that time, it should infer no usury; only, it should bind them either to restitution, or to allow and discount it in the next annualrent that should be paid them; but if any hereafter should take their full interest, they declared they should be guilty of usury.

The President and some others wrought vehemently for this interlocutor, and but narrowly carried it. Sir George Lockhart was out of all patience at it, for he would lose about L.2000 by it. He pretended he cared not for his particular, but to see the arbitrariness and illegality of the decision. It was much pressed, that it should only be restored or allowed where the debtor required the same; and that being disobeyed, then to be usury; but they were inexorable, and would not alter one punctilio of it; alleging there was no way to secure the retention to debtors but this. But since they appealed to the act of Parliament 1647, they should have taken it complexly; for it is declared by that act, that no debtor shall have the benefit of this retention, save he who pays his annualrents within the space of an year after it is due; but there is no such salvo in favours of creditors in the act 1672. Yea, by the 34 act, in 1640, there is only six months allowed them; so that if they paid not their annualrents termly, they forfaulted the said privilege. But the said act 1672, is guilty of many other inequities: which see in the special reflections upon the said fourth act.

Advocates' MS. No. 419, folio 225.

WINTER SESSION.—Anni 1673.

November, 1673.

TITIUS charges or pursues upon a bond granted to him by Sempronius. Sempronius alleges the obligation is null, being suspended upon his own option; and where *contractus confertur in meram et liberam voluntatem unius contrahentium, nulla oritur obligatio nisi voluerit; l.* 3, *D. de Contrahenda Emptione; l.* 13, *C. eodem;* and that it depended on his arbitrament, he subsumed and proved, in so far as the bond contained an express clause, declaring the sum should be payable at the debtor's conveniency, and whereof he was absolute judge.

ANSWERED,—This condition not being annexed to the obligatory part of the writ, but merely to the execution or exaction, it did not impede *quin nata erat obligatio et verum suberat debitum.* See *Vinnius, ad parag. 4tum, Institutionum, de Emptione et Venditione. Vide supra, 23d February,* 1671, Viscount of Oxenfurd's daughter, (it is No. 148.) *In jure verba debent cum effectu accipi; in contractibus non præsumuntur otiose adjecta, et ea semper sumenda est interpretatio ut actus potius valeat quam pereat seu distrahatur.* See Hadington, *25th February,* 1623, *Lyon* and *Scot;* and *l.* 12, *D. de Rebus Dubiis;* and the many other laws there quoted in the margin. And, therefore, albeit the sum in the bond was declared payable at his conveniency;* yet this clause is elusory, but must be reduced *ad arbitrium boni viri,* and be interpreted κατ' ἐπιείκειαν, *secundum bonum et æquum.* Which I think the Lords would follow either by examining the onerous cause of the obligement, and the other circumstances of the ability of the debtor

* This, Alisat, *ad legem* 125, *D. de verborum significatione,* expounds, *rationally, so soon as his other debt is all paid.*

and necessity of the creditor, and make them condescend what was acted, treated, and communed betwixt them, the time of the granting thereof; or would assign a competent day, betwixt and which the debtor should pay it, either in whole or in parcels: and so supply the defect of what was agreed amongst them, and render it effectual, since the debtor's own discretion will not. See Labeo's interpretation of this clause,—*Do centum nomine dotis cum commodissimum esset; id est, quam primum sine turpitudine et infamia dari potest. L. 79, p. 1, D. de Jure Dotium.* See this already marked by me, *alibi. Wissembach, ad legem,* 125. *D. de Verborum Obligationibus.*

Advocates' MS. No. 420, *folio* 225.

1673. *November.* SIR JAMES DOUGLAS of Smithfield *against* JOHN HAY of Hayston.

SIR JAMES DOUGLAS of Smithfield, uncle to the present Earl of Morton, pursues a reduction against Mr John Hay of Hayston, one of the Clerks of Session. The case was, Sir James Hay of Smithfield being obliged to pay L.2000 Sterling, *nomine dotis*, with his daughter, to Sir James Douglas, who married her; and having thereafter disponed his estate to William Hay, his second son, he relieving John Hay, the eldest son, of all debts he could be liable for as apparent heir; Sir James Douglas intents a pursuit against William, for payment of his L.2000 sterling. Mr John Hay of Hayston being then, in 1657, advocate to, and adviser of, William Hay, procures a bond, wherein Sir James Hay, the said William his father, was obliged, conjunctly with one Archibald Hay, a cousin of his own, to Mr Dicksone at London, in L.1000 sterling; and having got an assignation thereto, he thereon obtained a decreet against William Hay and his brother John, for payment, and used all means to stop and impede Sir James Douglas in his pursuit, till he had comprised the lands of Smithfield for that debt, and was infeft; and then gave way to Sir James Douglas' diligence and decreet, and who also comprised and was infeft; but it was before the act of Parliament 1661, bringing in all aprisers within year and day *pari passu.*

Sir James Douglas, on his comprising, raises a reduction of Hayston's comprising, on thir reasons; 1*mo*, As to the bond granted to Dicksone by Sir James Hay and Archibald Hay, (which is the ground of Hayston's comprising,) though Sir James Hay be first named therein, and so in the construction of the English law he is presumed to be principal, and the other only cautioner; yet it appears by the presumptions mentioned in the informations resulting from Dicksone the creditor's oath, whom the Lords caused examine *ex officio*, and other grounds, that truly Archibald Hay was principal, borrowed the money, and applied it to his own use. And as it was his debt, so it was paid out of his means and estate; for Archibald, by his testament and codicil relative thereto, ordained Sir John Lenthall, keeper of the King's Bench, to be relieved, who was pursued by Dicksone the creditor, for suffering the said Archibald to escape furth of the said King's Bench, where Dicksone had incarcerated him upon judgments and sentences obtained against him, and ordained the satisfaction and relief to be furth of the price of Stockley Park; and accordingly, Mr Andrew Hay, who was executor and administrator to Archibald,

having sold the said Park to one Chaloner Shuts, did transact with Dicksone, and satisfy him; so that both Sir John Lenthall and Sir James Hay were thereby relieved. *2do*, Not only was that debt paid in the manner foresaid, but also Archibald Hay, in his testament above mentioned, both left a special legacy of 10,000 merks to Sir James Hay, which he would not have done if Sir James had been obliged to have relieved him of Dicksone's debt, for which the said Archibald had suffered so much, and if he had not been principal himself; but further bequeathed a general legacy of liberation of all sums of money wherein Sir James stood indebted to Archibald: and, consequently, *esto, argumenti causa*, Sir James had been principal, and Archibald only cautioner in the bond to Dicksone, and so had undoubted action of relief against Sir James Hay; the same must be imported and carried by this *legatum liberationis*, being a debt due by Sir James to Archibald, in so far as Archibald was distressed for it, and judgments given out against him, and he imprisoned; so that, *nata erat ei actio*, and his relief was competent; which exists in the English law, either in case the cautioner be distressed, or obtain an assignation to the debt.

To which reasons it was ANSWERED, 1*mo*, That the presumptions and qualifications adduced to prove that Archibald Hay, and not Sir James Hay, was principal in the bond, are absolutely denied, and other probabilities opponed thereto, besides the presumption of the English law; which see in Hayston's information. To the second, though *omnibus debitoribus ea quæ debent recte legantur, iisque remitti possunt, parag.* 18. *Instit. de Legatis, ibique Vinnius in commentario uberiore;* and that, *facilius pervenitur ad liberationem quam ad obligationem, l.* 47, *D. de Obligationibus et Actionibus;* that legacies are favourable, *et sic ampliandæ et non restringendæ;* that general charges are to be extended *ad generalia*, as a special is *ad specialia*, or *quoad specificata*; and that the legacy of liberation can operate in no other thing, since no other debt can be condescended on owing by Sir James to Archibald. Yet these are all but general topics, almost applicable to any case, and which lawyers say, *plures habent fallentias quam exempla*, and are, in this particular case, of no moment, and inconsistent with the solid principles of law, and Mr Archibald's testament, and their first reason of reduction, as anything can be imagined; but are groundless and irrelevant, and have not the least colour and foundation in law; nor do they amount to the least weight to brangle, convell, or redargue the certain grounds of law whereon the defender bottoms, or the clear, evident, and undeniable will of the defunct. For, 1*mo*, Testaments, liberations, and legacies, are favourable, but not to be extended beyond their proper subject, or the meaning of parties, being privileged only *in propria materia et quoad effectus actionum bonæ fidei*, in so far as concerned *usuras, moram, et fructus.*—(*Vide infra, num.* 574, §. 4*to*, about 14*th June*, 1657.) 2*do*, A legacy of liberation in sense imports no more but a discharge and releasement of any debt the legatary owes to the bequeather; but not to debts owing by them both to a third party, as this is; for that were, by an intolerable stretch and violence, to detort and wrest any conception or *formula* of words, against the plain meaning and interest of the party given. 3*tio*, A legacy of liberation is altogether distinct in law from *legatum nominis*, which is the way Archibald should have legated Dicksone's debt to Sir James, if he had intended it. 4*to*, The *formula* used by Archibald in this his legacy of liberation, everts the extension to which it is now drawn; for he uses thir words:—"I forgive him all sums of money he stands indebted to me;" whereas, to make it carry Dicksone's debt, it behoved to be conceived thus—*Damnas esto hæres meus centum solvere Titio, ut inde libera-*

tur obligatione sua Sempronius,—or words equivalent. Do not think I am so ignorant as to mistake the *jus Codicis novissimum* of the Roman law, that has equalled all the four *genera legatorum*, and ordains them, *per præceptionem, damnationem, et sinendi modo*, and to have the same effect *cum legato vindicationis*; or that there is any weight in a precise *formula* of words; yet I contend the phrase and conception used by Archibald, is neither proper nor apposite to extend this legacy of liberation farther than what Sir James was owing to the defunct testator. And never lawyer under heaven was guilty of any other imagination in this affair; for they lay it down as a solid principle in law, founded on the rational interpretation of the wills of testators, that whenever he intends to legate what the legatary was properly owing him, then *verba executiva diriguntur ad legatarium*; as here, in our case, they are to Sir James Hay; and are *verba imperativa*, and take present and full effect; but if the defunct design to relieve the legatary of a debt owing by the said legatary to a third party, then *verba executiva diriguntur ad hæredem, et sunt precaria et obliqua*. And which distinction is no subtilty. *See par.* 2 *et* 3, *Institut. de Legatis, ibique interpretes.* 5*to*, A legacy of liberation partakes of the nature of a discharge, and are subject to the same rules, limitations, and restrictions, discharges are: *videlicet, ut quam minimum gravent, ut non extendantur ad ea quæ quis verisimiliter in specie non esset concessurus*, *l.* 6, *D. de Pignoribus et Hypothecis*; that they do not carry greater sums under the generality than the sums expressed. *Vide* act of Parliament 68, in 1503, and the marginal note there; all which see excellently applied to the case in hand in the informations.—See the debate between Sir A. Ramsay and Francis Kinloch upon this, *alibi*. 6*to*, A legacy of liberation is of the nature of donations; for the genus, in its definition, is *donatio, p.* 1, *Inst. de Legatis, par.* 1. *Instit. de Donationibus; Tit. D. de Liberatione Legata.* Now *nemo presumpitur jactare suum*, farther than the will of the defunct appears, which ever qualifies and restricts the legacy; as, for example, in a liberation of sums due by the legatary and others, *tanquam correi debendi*, the liberation does not carry the whole debt. Next, in such a *formula rationes exigi veto*: it is not a discharge of the debt, but a *relaxatio scrupulosæ inquisitionis* as to what is omitted or lost. (3*tio*,) At this rate, if a co-tutor, co-executor, *socius, exercitor, institor*, &c. should bequeath liberation to him that was adjoined with him in the administration, it would extend not only to debts owing by that conjunct to the testator, but to any debts owing upon the account of the administration by the legatary to third parties; which is absurd and ridiculous to imagine. (4*to*,) Such a legacy of liberation could not carry an infeftment for relief of warrandice, whereon distress had ensued. 7*mo*, It appears, Archibald Hay never looked upon this debt of Dicksone's as his own, else he had never suffered so much extremity by imprisonment, nor refused so obstinately to pay it. And as to the ordering Lenthall's relief furth of the overplus price of Stockley Park, this designed no payment to Dicksone; but, on the contrary, that furth of that overplus, Lenthall should be secured and defended against Dicksone's pursuit: as appears from Mr Caik, an eminent lawyer, his deposition; though it be pretended he is much balanced by this defender. As to Hayston being William's trustee and advocate, see it answered in the informations; as also see there a reply to this whole answer.

The Lords having considered this debate, depositions taken *ex officio*, and papers produced on both sides, found the reasons of reduction relevant and proven, and therefore reduced Hayston, defender, his comprising.

The great solicitations used by the pursuer, and the disadvantage Hayston lay under in common repute, furthered much this cause.

Advocates' MS. No. 421, *folio* 226.

1673. *November.* PALLAT, STEWART, GRAHAM, and MAXWELL of Pollock, competing.

IN a triple poinding between Pallat, Stewart, Graham, and Maxwell of Pollock, in which a man being at the horn, and assigning a bond to his creditor, and who, in right of the assignation, having uplifted the money from his debtor's debtor; the donatar to the cedent's escheat contends, that, *condictione indebiti*, he may repeat from the rebel's creditor what was so paid him, as *indebite et injuste solutum*, and assigned by him who had no power, and whose goods *fisco domini regis per ejus rebellionem erant acquisita.**

The Lords found, one at the horn could not assign, though it were in satisfaction to a lawful creditor whose debt was contracted *ante rebellionem;* but where the creditor, who was the rebel's assignee, has recovered payment before citation or interruption, they found that purged the vitiosity so far, as it could not be condicted by the donatar to the escheat; *Lege* 10. *D. Quæ in fraudem creditorum.*

This last part of the interlocutor seemed strange, how the numeration and solution could be of that energy and efficacy as to impede repetition, *et tractu temporis* validate that *quod ab initio non substiterat, contra regulam Catonianam;* unless we say, *multa fieri non debent quæ facta tamen valent: item,* after fungibles *quæ numero, pondere, et mensura constant,* as money, &c. are paid, *non amplius origo inspicitur. L. 7. C. Si certum petatur.*—M'Keinzie's Pleadings, p. 106. *Vide supra,* No. 156. Helen Hamilton *against* William Bell, 25th February, 1671; and 385. [Sir James Ramsay *v.* Robertson, February, 1673,] which seems somewhat contrary. *Infra,* num. 478. §. 2. [The Relict of Littlejohn *against* the Children, 17th June, 1676;] *infra,* No. 711, Deans and Purves, 18th January, 1678.

Vide Andreas Gaill, lib. 2. *Observatio* 25, *numero ultimo.*—See this debate and competition, between Veitch and Pallat, at much length elsewhere.

Advocates' MS. No. 422, *folio* 227.

1673. 11*th November.* PATRICK HOME *against* GEORGE CRAW.

MR PATRICK HOME, advocate, as having right, by translation, from Mr Hary Home, commissary of Lauder, who was donatar constituted by Sir Jo. Home of Renton, late Justice-Clerk, superior of the lands of Netherbyres, holden of his barony of Fleemington, of the liferent escheat of George Craw of Netherbyres, pursues a declarator thereof.

* See Hadington's Decisions, 26th February, 1612, Johnston; *item,* folio 91, Tarbet; *item,* folio 94. Tweedie.

It is alleged for George Craw, That the horning, whereupon the gift of escheat proceeds, is null, in so far as, before the date of the denunciation, a bill of suspension of the charge of horning was passed by the Lords of Session, upon unanswerable grounds of payment and compensation of the debt charged for; after which no denunciation could be made, nor escheat fall, and all diligence thereafter was fraudulent and null: and a practique *in terminis* was alleged on in 1668, between Renton himself and ———, wherein the Lords found diligence done after a bill of suspension was passed, to be null, illegal, and unwarrantable.*

To this it was REPLIED, 1*mo*, The nullity *non competit hoc loco* by way of exception. It must be insisted on by way of reduction, and in which the superior, viz. his brother Sir Alexander Home, (though he, by the tacks his father set to him, bruiks it,) must be called, who cannot be prejudged *cum res illius agatur*. 2*do*, *Non relevat*, unless they be able to say the suspension was passed, signeted, and intimated to the charger, or messenger; since no other deed (being *res inter alios acta*) could prejudge them, or put them in *mala fide*.

DUPLIED, 1*mo*, Though it be *nullitas facti* and not *juris*, yet, being instantly proven by production of the passed bill of suspension, compared with the date of the denunciation, *frustra* am I remitted to a reduction. 2*do*, Oppones the foresaid practique in 1668, where there was no intimation; *et scire debere*— &c.†

The Lords found the allegeance of nullity not receivable *hoc loco*, till we called the superior in a reduction; and he being once *in campo*, reserved the consideration of the relevancy thereof to that place. But it seems hard it should annul the course of diligence before intimation made. *Vide supra*, No. 252. [11th November, 1671.] *Vide decisionem sequentem.*

Advocates' MS. No. 423, *folio* 227.

1673. *November.* JOHN SOMERVELL *against* THOMAS BEG.

JOHN SOMERVELL, wright and poultryman in Edinburgh, having charged one Thomas Beg, upon a decreet of removing, obtained before the bailies of Edinburgh, Beg presents a bill of suspension to the Lord Preston, then Ordinary on the Bills, where it depends eight or ten days without an answer; which Somervell judging equivalent to a refusal, and imagining no legal stop, incarcerates Beg, on an act of warding, in the tolbooth of Edinburgh; who, upon a petition to the Lords, and Preston's assertion that he had verbally stopped execution till some things were cleared, Beg was ordained to be set at liberty, and Somervell sent to supply his room, for contemning the Lord's authority, the depending bill not being rejected. *Vide præcedentem practicam. Vide infra*, No. 499, Laird of Pittarrow and ——, [October, 1676.] *Vide* 7th November, 1678, James Johnston.

Advocates' MS. No. 424, *folio* 227.

* See Stair's Decisions, 30th January, 1663, Mr Andrew Hamilton.

† *Vide infra, numero* 463, Marquis of Atholl, [February, 1676;] *infra*, No. 711. Deans and Purves, [18th January, 1678.]

1673. *November.* CLAUD HAMILTON of Parkhead *against* MILLER of Milnheugh.

CLAUD HAMILTON of Parkhead having charged Miller of Milnheugh on a decreet of the regality-court of Hamilton, it was suspended. Amongst other reasons this was one, That it was null, being subscribed by the judge-pronouncer; as was found by the Lords,—Dury, 10th February, 1631, Commissary of Brechin.

ANSWERED,—Though the office of Judge and clerk be distinct, and not to be confounded, yet here there was some necessity for it, the clerk being dead, and no other as yet sworn and admitted; and it is offered to be proven, it was the custom of the court, that the Judge signed all his own sentences during the interval and vacancy; which is sufficient to the parties, the deed being true, and they *in damno vitando.*

I scarce think the Lords would sustain the decreet so subscribed. See also Dury, 10th January, 1623, M'Dougall; 29th January, 1629, Gibsone.

Advocates' MS. No. 425, *folio* 227.

1673. *November.* ANENT PRECEPTS OF CLARE CONSTAT.

ABOUT this time, *quærebatur,* if a precept of *clare constat* granted by a superior to his vassal's heir, for infefting him in the lands holden of him, prejudges the superior of any preceding duties, non-entries, or casualties, due furth thereof. It seems to be no discharge or exoneration of preceding casualties unless it bear a *novodamus.*—See M'Keinzie's Pleadings, p. 144.; and Dury, 23d March, 1630, Tourelands *contra* Auchnames.

Advocates' MS. No. 426. *folio* 227.

1673. *November.* RUTHVEN of Reidcastle *against* PITCAIRNE and ARBUTHNET.

IN an action pursued by Ruthven of Reidcastle *contra* Pitcairne, and one Arbuthnet, for redelivery of some corns and other goods and cattle, the first had poinded, and the second had bought from one of his tenants, the same being hypothecated to him for his year's farm.

ALLEGED for Mr Pitcairne, That the master's hypothec could not be so exorbitantly extended, as to give him interest to repete his tenant's goods or corns poinded for lawful debt, unless either he had appeared at the poinding or apprising, and stopped the same upon his right of prelation to all creditors *quoad* an year's rent, or that he will say that *ipsa corpora* are extant; for if the *species* be *bona fide consumptæ* before any question was moved by the master against him, how can they be condicted? Besides, it were to destroy all commerce.

The Lords inclined to repel the allegeance, and find the goods poinded, though *bona fide* used and alienated, might *quoad* their value be repeated. But this were to make it a very hask privilege. See Sir George Lockhart's thoughts against it *supra*, February, 1671, No. 146, and the citations from Dury there.*

For the other defender I alleged *absolvitor;* because I offered to prove by witnesses, that the tenant had, at the time when he sold these goods, at least betwixt Yule and Candlemas, as much corns (for *utensilia* and stocking is not enough) as would pay his master that year's farm. But in proving thereof, special notice would be taken, that witnesses be used who know what was his yearly duty he paid to the master, and the precise quantity of the corns he had in his barn or barn-yard, (for his growing corns will not be accounted as sufficient, since they must pass in account for another year,) and be interrogated particularly thereon; and if either this be omitted, or the witnesses ignorant thereof, the exception at the advising will be found not proven by the Lords.

Advocates' MS. No. 427, folio 228.

1673. *November.* ANENT LIFERENTRIXES.

ABOUT this time it was queried, If a woman, liferentrix provided to so many bolls or chalders of victual, or infeft in an annuity or annualrent furth of lands for her liferent use, will be liable proportionally, and *pro rata* of what she possesses, to the public burdens, with the fiar.† Either it is declared she shall have right to such an annuity free of all incumbrances, or that her jointure be worth so many chalders of victual, or it is due merely by a personal obligement to pay as well infeft as not infeft; and in either of thir three cases it is thought she will have right to her full liferent, without allowance of any defalcation for burdens: but if her liferent right be constituted by infeftment, and she in possession, she will in that case be liable for her proportion of the public burdens. I said, in this second member of the distinction, that she must be in possession, else it is thought she will not be obliged to acknowledge these *debita ex fundo provenientia, et quæ rem afficiunt et sequuntur*. And thus inclines the act 3. made on the 10th of December, 1646; and it is affirmed, the Lords have so decided, first between the Lady Rossyth and her son, and then between the Lady Cassills and the Earl of Roxburgh.—*Vide* l. 27. p. 3. D. *de Usufructu. Vide jurisconsultissimum Joannem Vandum*, lib. 2. quæs. 22. See act 20, in 1663, and some observations, *alibi*, anent tercers undergoing public burdens. See 23d February, 1681, Lady Aberlady.

And, really, it cannot be thought rational, that the fiar shall bear the burdens imposed *intuitu* of land, whereof he is not in possession, but debarred by liferenters. Natural equity provides, *ut eum sequantur incommoda qui habet commoda;* they who reap the emolument ought not to grudge *onus ei annexum*, l. 10. D. *de Regulis Juris*. What if the heir have little or no profit? sure it is hard to require brick

* See M'Kenzie's Observes on the Act 1621, p. 104. Dury, 3d February, 1624, Hayes *contra* Keith, *in fine*.

† If she be infeft, some determine she is liable; otherwise, is not. *Onus temporariæ indictionis ad fructuarium pertinet*, l. 28. D. *de Usu et Usufructu Legato*. See February, 1680, Absents from the Host, p. 27, Mr De Ferriere cited.

of him without furnishing straw, unless express paction be in the contrary. See the Lady Rossyth's case.

Advocates' MS. No. 428. *folio* 288.

1673. *November.* JAMES SYME *against* INGLIS of Murdeston.

JAMES SYME, tenementar in Hamilton, charges Inglis of Murdeston on a bond for 200 merks. He suspends; offering to prove, by the charger's oath, that the true cause of the granting of the bond was not borrowed money, but for the price of a horse: which being granted, then offered to prove by witnesses, that the said horse was scabbed, and insufficient, and not worth the money, and that he offered him back.

ANSWERED,—The reason was not relevant to be proven by witnesses, contrary to the brocard of law, That writ cannot be taken away but by a contrary writ or oath of party. *Idem eodem modo dissolvi quo colligatur, naturale est;* l. 35. D. *de Regulis Juris.* Dury, 15th July, 1624, Nisbet *against* Short; *supra, numero* 329, in February, 1672. 2*do*, *Esto* the horse had been insufficient, *sibi imputet*, his eye being his merchant; unless he will make it relevant, and offer him to prove, that the seller, now charger, promised to warrant and uphold the horse, or knew its imperfections and fraudulently concealed them, or that they were so latent as they could not be perceived save after some time's trial. 3*tio*, He must say, that how soon he discovered the imperfection, he instantly intimated the same to the seller, and offered him back. And all which, to take away his bond, may be proven allenarly *scripto vel juramento.*

REPLIED,—That the bond was no other way here to be taken away but by the charger's oath, who once deponing and confessing the condition and cause onerous of the bond to have been for the price of a horse, that reduced the case to the nature of a bargain, the terms whereof no lawyer controverts but are probable by witnesses:—*Vide supra*, in December, 1672, No. 378. *in calce.* And he needed not prove the charger promised to uphold it, because *nemo ex suo dolo lucrari debet, actionem ve consequi*, l. —. D. *de Regulis Juris; et contractus emptionis et venditionis* is *bonæ fidei*, in which trust is most exuberantly relucent; and the *edictum ædilitium* has introduced, upon most rational considerations, the redhibitorian action, in case of latent vitiosity.—See my observes *alibi* on that edict, and a decision on the 1st of July, 1657, Fleeming and Reid.

The Lords found, the bond might be taken away in the manner offered in the reason: and that the charger acknowledging once it was for the price of a mare, then witnesses might be led as to terms, communing, agreement, and the insufficiency of the thing sold.

Which was thought somewhat lax, exposing all bonds granted for any other cause than borrowed money, (which bonds are very frequent in buying wares from a merchant, &c.) to be cavilled on and exposed to the tentation of the integrity of witnesses, if the goods given for the bond were sufficient; and draw the most tedious, troublesome, and uncertain inquiry into their goodness or badness, after many years.

If the Lords had ordained witnesses to be examined before answer *ex officio*, the hazard had not been so great, for that cannot be drawn into a preparative and ex-

ample. However, I find the Lords wanted not precedents for what they did; for Dury tells us, on the 23d of June, 1626, the same was then decided between Maxwell and Drumlanrick; see him, also, at the 26th of July, 1622, Esilmont and Buckie. *Vide infra*, in February, 1676, James Brown and Matthew Loury, *numero* 470.

When the probation came to be advised, the Lords found the insufficiency of the horse proven, and the offer back; and thereupon suspended the letters, and assoilyied from the price. But if they had adverted, that the charger never got back his horse, but that he strayed waiff, it had been much more just to have modified something to the charger for his horse *actione quanti minoris*, upon the account of the scab it was proven he was infected with, and not make him lose both horse and price; but Sir Jo. Dalrymple was for the suspender. See Stair's System, tit. 10. Of Conventional Obligations. Dury, 9th January, 1629, Brown and Nicolsone.

Advocates' MS. No. 429, *folio* 228.

1673. *November.* HALBERT LAUDER *against* WILLIAM ALISONE.

HALBERT LAUDER having married William Alisone's daughter, in the contract of marriage William obliges himself to pay L.1000 in tocher: 500 merks of it in good and sufficient ware; 500 merks in assignations to bonds; and the other 500 merks in money. Halbert charges for the L.1000. Alisone suspends. 1*mo*, That he had given him 500 merks worth of goods. 2*do*, He had assigned him to the value of 800 merks of bonds. 3*tio*, Upon compensation; he having given his daughter, before her marriage, merchant ware, to set up a little shop with, to the value of 400 merks. 4*to*, He had alimented them an year in his house after their marriage, for which he craved 600 merks. And, upon thir grounds, he had a process depending before the bailies of Edinburgh against his son-in-law, to hear and see it found and declared, that he had paid the L.1000 of tocher in manner foresaid, and were owing him 800 merks over and above it.

To this it was ANSWERED,—That the ware and bonds were acknowledged and accepted in part of payment: except one, which proving desperate, he offered to retrocess, since he was obliged to give him good and sufficient bonds; and he never accepted it in satisfaction. And if it be pretended, that assignations are presumed to be taken in satisfaction, where the contrary is not expressed and provided; it is answered, the presumption is just opposite, that assignations are not supposed to be accepted in satisfaction. See Hadinton, 25th February, 1624, Wishart *against* Ferme.—As to the third reason, it was absurd and ridiculous to think, that goods given to a maid *in familia* with her father, (like a *peculium profecticium*, to trade with apart,) and before marriage, can constitute a debt, so as to be obtruded for a ground of compensation, or imputed *ex post facto* in satisfaction of an obligement for a tocher, contained in a posterior contract of marriage, not relative to that furnishing, or mentioning that it shall be ascribed in the fore-end of the tocher.—Yet it may be doubted, whether what a father so gives his children *in familia* will be reputed *animo donandi*, or *animo repetendi*, at least *animo* to impute and attribute it in their legitim and natural portion, *pro tanto*.—As to the fourth, anent the aliment,—*non relevat*, unless it were offered to be proven, that it was promised and

conditioned by paction. As for the suspender's desire to have the suspension, or ground of it, remitted to the bailies of Edinburgh, since the cause coincident and of equivalent nature, is depending before them, it is impertinent; since the *connexitas et continentia causæ* ought rather to attract that of the bailies hither, as the nobler Court, than the action before the bailies should draw this to them.—See Stair's Form of Process, p. —. and the laws there cited on the margin.* Dury, 25th November, 1624, Hamilton *against* Mathison.

There was also another reason of suspension insisted on, viz. that, by the contract-matrimonial, Halbert, the charger, was mutually obliged to ware and employ L.1000 Scots, on sufficient security and annualrent to the wife and children; which reciprocal obligement not being performed, he was not tied till that were done.

ANSWERED,—That can never stop execution for payment of the tocher; no execution being ordained to pass at the suspender's instance, and the wife and children concerned not craving it; and it being more their interest that it be employed in merchandizing, by which it will afford double the annualrent. And, therefore, I think that destination should be dispensed with where the party uses trade.

See the information of the cause *apud me*. *Vide supra*, No. 180, in June, 1671; and 321. [Laird of Balnamoon *against* M'Intosh,] in 9th February, 1672.

Advocates' MS. No. 430, *folio* 228.

1673 and 1677. LADY GRANGE and WILLIAM DICK, her son, *against* SIR LAURENCE OLIPHANT of Gask.

1673, *November*.—IN 1618, Sir William Tyrie of Drumkilbo, and his cautioners, granted bond to Sir Patrick Douglas of Kilspindy for 7000 merks. Kilspindy assigns this bond to Douglas of Lumsdean in 1638; who thereupon obtains a decreet of registration against Sir William Tyrie's heir, and charges him, and such of the cautioners as were living, with horning. This assignation having been apparently to Kilspindy's own behoof, was afterwards given up to him, and cancelled. Kilspindy, in 1642, becomes bound, as cautioner for John Rind, to William Dick of Grange and Janet Macmath, his spouse, the longest liver, in 10,000 merks. Janet, in 1647, arrests the 7000 merks, due by Tyrie to Kilspindy. For evicting and eluding of which arrestment, this conveyance was thought on,—to make a new assignation, by Kilspindy to Douglas of Lumsdean, of the bond, in place of the former cancelled one, and of the same individual date it bore, viz. the 17th of April, 1638; that so, the hornings on the former assignation answering to this, it might pass for the first intimated by the charges of horning, and be preferable to the arrestment; and, for making it more obscure, Lumsdean, the assignee, transfers it to Gask.

The Lady Grange insisting against Tyrie for making forthcoming, he suspended, on double poinding between the assignee and arrester, in which she proponed an exception of falsehood against the assignation. But the Lords then, in 1658, preferred Gask; reserving to her, action of improbation.

* *Videlicet* that *judiciorum contiguitas, connexitas, et continentia, non est dividenda;* l. 10. C. *de Judiciis;* l. 13. C. *de Rei Vindictione. Hippolitus de Marsiliis singulari*, 654.

Accordingly, in 1667, she raises improbation on thir grounds, (the direct way being extinct, by the notary and witnesses their decease,) 1*mo*, That the assignation was false evidently in the date, because it narrates, deduces, and relates to a decreet of registration near four months after its own date, which is the 17th of April, 1638, and the decreet it mentions is not till the 24th of July, 1638. Now, of the law, *falsum in data corruit in totum*, and can make no faith, the date being *de substantialibus instrumenti;* and was so decided, in Dury, 29th March, 1626, Keith and Robertson, and the citations there: see Craig, Feud. p. 156; Dury, 10th February, 1636, Edmiston; and lately found, in the case of Shaw and Calderwood, on the 11th February, 1669: see also *supra*, No. 375. in November, 1672, George Hoome and Brown. It is the opinion of all lawyers, that *falsum*, even in *capitulis disparatis*, vitiates and derogates from the faith of the whole writ; just as falsehood in one point of a witness's depositions, convells, redargues, and enervates the whole; and much more in a false date, which indivisibly affects and respects *totum instrumentum;* and, for this end, law ordains the date to be inserted, for a mean of improbation: and if it were not, it were an inlet, foundation, and encouragement of all forgeries, if men were allowed to condescend on other dates than it bears, especially in cases of competition, though, *quoad substantiam actus*, the other date were fully astructed: See more of this in the informations. 2*do*, William Dalzeell, the notary, upon his death-bed, before Mr Robert Laury, minister, and Bailie M'Morran, declared, he wrote that assignation about 1648, which is after the arrestment, and it was then blank in the date and name; which proves, it was patched up to defraud and evacuate the arrestment: which most serious declaration proceeded from a mere sense and conviction of truth, *et nemo moriens præsumitur salutis æternæ immemor.*

ANSWERED to the first of thir,—That the date is not always a material part, *ubi constat de substantia actus, et negotii gesti veritas est in vado.* That a date may be wrongously inserted, without any fraud or design, or eventual prejudging any. The error of a wrong date was never, *per se et solitarie*, sustained as relevant to convell the faith of a writ, without dole or prejudice redounding to some party thereby; *falsum* being *crimen quod sine dolo, animo, et proposito, non committitur.* And every error *in data* does not infer falsehood, since *inter falsum et verum datur medium, sc. error;* which errors in dates are very frequent.* And, here, 17th April is put for the 17th of August; and the Lord Balcomy, in 1657, being then President, allowed them to hold the month as delete, they abiding at the assignation as truly granted in that year; so that it is *res hactenus judicata:* and the pursuer having suffered the direct manner to perish, and never having raised review of that decreet *debito tempore*, she cannot be heard now; so that neither *dolus* nor *nocumentum partis* can here be qualified. And whereas it is alleged, that this late assignation is antedated to make it quadrate with the old horning raised on the first, it is answered *negando. A posse ad esse* is an evil consequence; and the honour and uprightness of the gentlemen concerned, is a greater adminicle of the truth of what they assert than the pitiful conjectures and slender pretences in the contrary. And they will abide at it as a true deed in August, 1638, which is all the Lords required and considered in the case between Doctor Pittillo and the Lady Feddinche. Besides, the

* See Dury, 4th December, 1629, Winrahame. Hope's Collections, *titulo* Of Improbation, *folii mihi* 183 *et* 185.

defenders, being singular successors, did *bona fide* transact and pay real money for the right of translation; and it is hard, after thirty-eight years, all parties being dead, to annul such a right upon a wrong date, it being only *lucrum cessans* to this pursuer, who is opulent. As to the trust was in Lumsdean's person, it is incompatible here. Let them raise a declarator. *Et exceptio falsi* being *omnium ultima*, even there it could not be received. As to the writer's declaration, no regard; *1mo*, Because extrajudicial. *2do*, False; he affirming he wrote it in 1648, and yet it is registrate in 1647. *3tio*, The eliciting that declaration was a practice unwarrantable and indirect.—See the reply in the informations.

On this debate, the Lords, before answer, allowed the parties to adduce such evidences, adminicles, and testimonies, as they could, either by writ or witnesses, to instruct what was the cause of the assignation quarrelled, granted to Douglas of Lumsdean; whether it was for onerous causes and relief of cautionary, wherein Lumsdean was either creditor to, or cautioner for, Kilspindy, the cedent; and if the debt and cautionary was satisfied, and how, and by whom. This was to find out if it was only a trust in Lumsdean's person, for then the arrester was clearly preferable. In obedience, both parties produced sundry writs and documents; which, being advised, the Lords, upon the probability of the trust and behoof, and the antedating, improved the assignation.

Advocates' MS. No. 431, *folio* 229.

1677, 18*th January*.—In the Lady Grange Dick and Sir James Douglas's case *against* Oliphant of Gask, mentioned *supra*, in November, 1673, No. 431, about Gask's false assignation; they found him liable *in quantum lucratus et locupletior factus erat* by it; though he had a true assignation *super eodem subjecto; quia nemo debet ex proprio dolo lucrari:* for his true assignation having fallen by, another was forged, and thereafter the true one found; *et non est magna falsitas quæ habet primordium veritatis.*

Advocates' MS. No. 534, *folio* 273.

1673. *December*. Anent Attesters of Cautioners.

In a certain action, between and , the Lords found both the principal suspender and the cautioner behoved to be discussed before the attester. And that the attester of a cautioner in a suspension attests only his solvency, sufficieney, and responsality; but not his age, in case he be minor, and revoke his attestation; unless the creditor will offer him to prove, that the attester knew the cautioner was minor, for then he will be liable: and the creditor needs not qualify he *dolose* knew it, since *animus colligitur ex silentio*. *Vide supra*, No. 181. 22d June, 1671.

Advocates' MS. No. 432, *folio* 230.

1674. *January.*

In the same month of January, 1674, the Lords, in sundry causes before them, found the following points:—

I. That *minor non tenetur placitare*, in a reduction of his father's rights; but if an improbation be raised, the defence of minority will not hinder the production but it must be satisfied, or the examining of writer and witnesses *ex officio*, to lie *in retentis;* lest the direct manner of improbation perish *medio tempore;* (where the improbation is truly levelled at some suspected falsehood, and is not raised and cumulate, of course, with the reduction, only to make the certification stronger, in case of not production;) only the debating the reasons, or advising the said probation, must stop and lie over till majority: and some deny this privilege to minority *in causa falsi.*

II. That an annualrenter can never attain to the natural possession of the lands, but only to the civil and legal, by decreets of poinding of the ground; so that where a man has two rights in his person, both a comprising and an infeftment of annualrent, his possession will be ascribed rather to the extinguishing the first than the last; the first being a more sovereign right and of the property, the annualrent being only a servitude. See Dury, 27th February, 1630, Patersone *against* Scarlet; and the cases there.

III. Found, That an infeftment of annualrent makes not the haver vassal in the lands, (being only a servitude, as said is;) and, therefore, by his death no casualties of ward or marriage do fall, though nonentry will, *quod valet seipsum;* yet a wadset is otherwise, being a temporary infeftment of the property.

IV. Found, That disponing or selling of lands is a *gestio pro hærede;* see Dury, 21st December, 1626, Irving; but it is doubted by some, if the renouncing a reversion, legal or conventional, for a sum of money be a gestion or not. *Vide* l. 13. p. 6. D. *de Hæreditatis Petitione.**

V. A pursuer finding himself at the horn, and that he may be debarred, he assigns the action to another for eviting it; *quæritur*, if it may meet the assignee. Either it is *lite pendente*, or before: if *lite pendente*, then *nihil est innovandum;* besides, *alienatio fit hic quodammodo in potentiorem, et judicii mutandi causa.* 2*do*, It is either before or after the horning was produced against the cedent; if after, he seems to be *in dolo;* yet in either case, the horning being personal, *non egreditur personam.*

VI. A tack in our law maintains against a singular successor, and is, in so far, declared to be a real right; act 18, Parliament 1449: though the Roman law owned it as a mere personal contract, as truly it is no more, *l.* 9, *C. Locati.* And yet our law may be thus far defended from the principles of the common law, teaching, *quod nemo in alium plus juris transferre potest quam ipse habet, l.* 54, *D. de Regulis Juris; ergo*, the seller conveys no other right to the buyer than what he had; and as the buyer could not have quarrelled the tacks set by himself, so neither can his successor, who gets the thing *cum suo onere et causa.* See Philibert Bugnion, in his *abregèe des loix unisitees en France, page* 44; *Bartolus ad l.* 1, *par. quod ait* 3, *D. de Superficiebus.* Yet with us, a bond of borrowed mo-

* See Dury, 27th January, 1636, Straiton; 10th February, 1642, Johnston.

ney, bearing an assignation to the maills and duties of lands or houses within burgh, aye and while the sum be paid, or a location of land declared to resolve and expire upon the payment, is not regarded as a tack to affect and carry the real right of these lands against one that is a singular successor to the granter; because it wants the formalities of a tack, viz. a certain tack duty, and a definite issue; because it is only personal, and no such real right as a tack is.* And this has been often so found and decided; Dury, 13th July, 1621, Laird of Muckhall, and the cases there. January, 1674, in the case of Peacock *against* Bailie Lauder; and was, in the same year, 1674, so advised by Sir George Lockhart, in a process pursued before the bailies of Edinburgh, by Mr Jo. Forrest, minister at Tilliecoutry *against* Alexander Brownley, tailor in Edinburgh. And yet this same argument and ground of law will militate against back-tacks in wadsets; which is clearly a tack set by the creditor to his debtor *rei propriæ, in eventum* of the payment of the principal; see l. 6. p. *ult.* D. *de Precario;* l. 45. D. *de Regul. Juris, ibique Brouchorstius,* where you have what comes nearest to our back-tacks. If it be alleged, there is a difference, because the back-tack is engrossed and incorporated in the body of the real right, and so makes a part of it; yet, it may be answered, many clauses *in gremio* of real rights, yet are merely personal obligements, and have no force *rem vel fundum afficere* if it pass to singular successors, since they cannot be so easily known, unless they be not only in the disposition, but also in the procuratory of resignation, charter, and seasine following thereon.—See some excellent clauses of tailyies, *apud me;* see M'Keinzie's Pleading, Creditors of Annandale and Stormont; see other papers beside me. Yet Sir Jo. Cunynghame thought our practique, in rejecting tacks set aye and while a sum be paid, to be an error deserving amendment; and that the first decision, it is like, has been obtained by moyen: otherwise we must condemn back-tacks also.

Advocates' MS. No. 436, folio 230.

1673 and 1674. General DALZEEL *against* The TENANTS of Caldwell.

1673. *June.*—GENERAL DALZEEL, as donatar to the forfaulture of the Laird of Caldwell, pursues a removing against some of the tenants of these lands; for whom it is alleged, that they bruik by virtue of tacks set by the Laird of Caldwell, before his committing the treason and being in arms at Pentland, for which he was forfaulted; and whereof there are sundry years yet to run, and so cannot remove.

REPLIED,—That by the forfaulture, founded on the vassal's treason and rebellion, the fee was opened, and the lands returned as free and unaffected as when they were first given out, unless it were rights consented to or confirmed by the superior, which tacks were not. That tacks could have no more privilege than base infeftments unconfirmed, which, though clad with never so long possession, could never defend against a donatar. That tacks cannot sustain against a superior, neither in wards, nonentries, recognitions, disclamations, liferent escheats, nor these other ca-

* In February, 1676, the Lords found, in a case between James Johnston and James Syme, a tack so conceived null, *ope exceptionis,* without necessity of a reduction, or calling the setter. See Dury, 20th March, 1630, Murray *against* M'Keinzie; 18th January, 1633, Earl of Marshall. See Craig, *paginis* 203 and 207. And this they did, though he was twenty years in possession by virtue of his tack.

sualties; and therefore much less should stand against a forfaulture. That else his Majesty's interest might be easily evacuated, by setting tacks at imaginary and incompetent avails before they commit treason. That they are less favourable than heritable alienations where the full price is paid; and yet such alienations become null upon the forfaulture, where not confirmed. Yea, tacks of any duration, as for nineteen years, are reputed as alienations; so Craig, p. 205: and therefore must be in the same case with them.

DUPLIED,—Tacks, by act of Parliament, James Second, (Act 18, in 1449, contrary to the civil law, l. 9. C. *Locati*,) are ordained to stand secure against all singular successors; *ergo*, also against the donatars to forfaulture. That it is the interest of heritors, and of the poor labourers of the ground, and for the policy of the kingdom, to have it so, for improvement of lands. That the act 202, Parliament 14, James Sixth, in 1594, (see the laws there cited on the margin,) annulling deeds done by persons forfaulted, speaks only of such as are done by them after the commission of the crime; and though, in the narrative, it mentions tacks set after the crime perpetrated, yet, in the dispositive part, there is not one word of them; whereas, if the law had meant any such cruel and devouring extension, that was the alone proper place, but is *ex proposito* omitted, for *ubi lex non loquitur nec nos*, &c. But Craig, p. 206, is most positive that tacks are not prejudged by forfaultures; yea, Maitland of Leidington, (17th March, 1569, folio 58,) hath an express practique at the year 1570, between Home of Manderston, and the tenants of Auldhamstocks, where the Lords found, tacks set before the crime a good and sufficient right to defend on against the forfaulture; and wherein this very debate, and the instance of base infeftments, was fully urged and repelled; and he also tells of another case, wherein the same was found by the Lords of before. Craig, *Feud.* p. 206, is express, *valet assedatio, licet ex post facto forisfactus sit is qui locationem fecerit.* See act 37, Parliament 1571; but that is rescinded by the act 201, in 1594. *Vide supra*, No. 122, the Earl of Argyle *contra* George Campbell. That tacks set before the crime would be preferred to any public infeftment, or base infeftment confirmed between the commission of the crime and the forfaulture; but, *ita est*, any of these infeftments, as more preferable, would seclude this donatar to the forfaulture; *ergo*, much more must the tacks do it, *per regulam, Si vinco vincentem te, tunc te vinco;* l. 14. p. 3. D. *de Diversis Tetemporalibus Præscriptionibus. Vide Everhardum Præsidem, in locis legalibus, loco primo ad ultimum*, p. 658. As for the argument drawn from base infeftments, the same is of no moment or weight: Because, 1*mo*, The one is a perpetual, the other only a temporary exclusion. 2*do*, The one has little or no profit with it; the other pays near the avail of the land. 3*tio*, The one tends to the melioration of the fee; whereas the other dilapidates, lessens, and dissipates the same. And as for the argument drawn from wards, it is most inconsequent; for there the effect of the tacks is only suspended, interrupted, and laid asleep for a time; whereas here, the design of this donatar is to extinguish them for ever. As for the argument drawn from recognition, liferent-escheat, and the other feudal delinquencies founded upon presumptive contempt, as if tacks cannot defend against them; it is wondered to hear so absurd an assertion pretended, seeing it is most consonant to law that they should defend against all these calamities: neither is the contrary ever decided. And setting of tacks for just duties is a mere act of administration, even competent to those who are not proprietors; Craig, p. 204; *videlicet*, to all *qui habent plenam puram et debitam feudi administrationem;* and so differs extremely from heritable alienations; l. 8. D. *de Juris et Facti Ignorantia.* And if *ignorantia juris*, where

it is dubious, be very excusable, especially in *rusticis ubi certant de damno vitando*, then much more must *defectus juris* be such; but, *ita est*, there is no style, no practice, nor precedent known, for confirming tacks, and saving them from the danger of forfaulture, if they be not valid rights, secure from these after-claps of themselves. And if any such thing seem convenient to be introduced now, the same cannot reach such who have acted *bona fide*, according to the custom and law now known; and it needs *constitutione Imperatoria:* and the l. 10. D. *de Jure Fisci*, would be considered, *quod in dubiis questionibus non errat qui contra fiscum responderit;* and that of Plinius to Trajan, *in panegyrico, Causa fisci nunquàm mala est nisi sub principe bono.*

See a very learned triply to all this in the informations beside me.

Advocates' MS. No. 406, *folio* 219.

1674. *January 28th.*—In the debate largely marked *supra*, General Dalzeell *against* the Tenants of Caldwell, *num.* 406, [June, 1673,] the Lords having advised it, they found, tacks set to a competent and adequate avail, as thir questioned were, good and sufficient to defend against a forfaulture; but not where the duty was unanswerable, elusory, imaginary, or within the true avail: and this decision was grounded on the 18th and 19th acts of Parliament in 1449.

Vide infra, No. 446. [Earl of Aboyne, February, 1674.]—See 27th January, 1680, thir same parties.

Advocates' MS. No. 437, *folio* 231.

1671 *and* 1674. The Earl of Louthian, and the Ministers of the Presbytery of Jedburgh, *against* the Town of Edinburgh.

1671, *November* 4.—The Lady Yester, *in anno* 1645, enters into a contract with the Provost and Bailies of Edinburgh for the time, by which she lends to them 5000 merks; the interest whereof is granted to the town during her lifetime; and after the same, she destinates and mortifies the said sum to the poor of the parishes of Jedburgh, Oxnam, Hoprigg, and Sprouston; and other pious uses mentioned in the said contract. For the payment of the sum there is a requisition made; which not being obeyed, there is a summons raised at the instance of the Earl of Louthian, as now heritor of the forsaid parishes, by being come in the place of the Lord Jedburgh, and so patron of this sum; with consent and concurse of the ministers, elders, and deacons of the said parishes; against the good town, for making payment of the forsaid sum, that it may be employed conform to the destination contained in the contract.

It was alleged by the town, 1*mo*, No process; because all that they produce to instruct that they are debtors in the said sum, is allenarly a copy or attested double, under Robert Adamsone and David Peter their hands, being two under-servants in the Town-Clerk's chamber; which double, unless the principal contract were produced, can never make faith against the defenders, nor bind this debt upon them. 2*do*, They offered to prove the sum was paid to the Earl of Louthian. 3*tio*, Offer to prove the haill bygone annualrents are paid to the pursuers, or others having their warrant.

To thir it was REPLIED by the pursuers, 1*mo*, The attested double must make faith, because it is a just double of the principal contract, attested by the defenders their own clerks and servants in the chamber; and craved the Town-Clerk and his servants their oaths of calumny, if they had just reason to deny that they had the principal in their own custody, or knew where the same was. The Lords ordained them accordingly to give their oaths of calumny. To the 2*d*, it was replied, payment to the Earl of Louthian *non relevat;* because, by the contract of mortification, the said sum was ordained to be paid to the heritor, ministers, elders, and deacons of the forsaid parishes, at least to the major part of them, conjunctly. The Lords ordained the town, before answer, to have letters for summoning the Earl of Louthian to compear and depone upon the allegeance of payment. As to the 3*d*, it was found relevant.

In this manner was litis-contestation made in the cause; and, conform to the act thereon extracted, Mr James Rocheid, George Cheyne, and Alexander Gaye compeared, and by their oaths of calumny, denied that either they have, or ever saw, the principal contract, or that they know this to be the just double of it. The Earl was summoned personally to compear and depone upon the payment, and was holden as confessed for not compearing. As for the allegeance anent the payment of the annualrent, the term was circumduced against the town, under the pretence that, *in termino*, they had produced nothing to verify the same. Against which they must be reponed, because they will refer it to the pursuers' own oaths.

Then a bill was given in by the pursuers, desiring the cause may be advised. The Lords declare they will advise it. The town protests they may be heard at the advising. Conform whereto, the parties' procurators being called in at the time of the advising, the libel, defences, and whole state of the process, being resumed by the clerk, it was

ALLEGED by Sir R. Sinclar, for the pursuers, That the town having proponed a peremptor of payment to the Earl of Louthian, they can never hereafter be heard to quarrel their title, or the justness of the debt, or to allege that the attested double, produced without the original contract, can make no faith to bind this debt upon them; seeing this is more than a tacit acknowledgment or homologation of the debt.

To this it was ANSWERED, by Sir G. Lockhart, 1*mo*, That the payment proponed by them was a separate and distinct defence from that of the want of a title, and a defence which they intended only to recur to if the Lords should sustain their title as sufficient; and, accordingly, the Lords' interlocutor thereupon was only before answer. 2*do*, It was only *ex supposito; esto* the town were ever debtors in that sum, which we noways grant, we offer to prove it is paid. 3*tio*, It is an uncontroverted rule in law, *quod reus potest petere contraria;* he may propone contradictory, inconsistent exceptions; that, in case he succumb in one, at least he may prevail in another.*

* *Imo tantum diversa*, l. 5. l. 8. and 9. *ibique Gothofredus, D. de Exceptionibus;* l. 43. *ibique P. Faber, D. de R. Juris;* he cannot propone incompatible exceptions; yet see *Glossam, in fine, ad* l. 14. C. *de Fide Instrumentorum, et Glossam ad* l. 39. p. 7. *ad verbum Ex stipulatu, D. de Evictionibus, et Perez ad Tit. C. de Exception. numero* 28. *Dumnum ad regulam* 20. *Juris canonici: vide supra num.* 115. *et infra, num.* 352. *et* 449. 438.

The Lords found, we might object against the validity of their title, though we had proponed payment, seeing it was *separatim*.

Then it was ALLEGED for the town, that the present magistrates were so great friends to all donations for pious uses, in this age so barren of all good works, that if any of them had the least conviction or knowledge that ever there were such a debt lying upon the town, or that the same were yet resting and unpaid, that they would not have the confidence to seek to be liberated therefrom. It is true, a mortification *ad pios usus* is *causa favorabilis:* it has many prerogatives in law; but no lawyer ever gave it that privilege to be due, where it is not sufficiently instructed. It is a great iniquity to defraud the poor, and to evacuate the will of the pious lady, it is true; but your Lordships must advert that in shunning Charybdis ye fall not on Scylla; that out of a headstrong zeal to make this mortification effectual, ye pass not a preparative of infinite more moment and danger to the lieges. What incorporation, yea, what private person, shall judge themselves secure, if it shall be in the power of two notaries, (who, of a long time, have been the opprobry of law; of whom Azo rightly said, *Ob imperitiam et nequitiam notariorum corruet mundus;* and whom your Lordships, upon very wise and very grave considerations, have retrenched so, that their acts, except in some very few and inconsiderable cases, do not bind without the parties' subscription,) to draw on them what debt or sums of money they please to attest to be contained in such and such bonds, which they have collationed and copied? If your Lordships' under-clerks should attest a renunciation of your rights ye have upon Morhame, or North Berwick, or the mills of the Water of Leith, and this were adduced against you; I humbly desire to know, if this ye would hold as sufficient, without production of the principal renunciation granted by yourselves? It is, therefore, *certissimi juris,* that attested copies can make no faith; else all the debt the town has contracted since they were a town, and much more than they could bear, might be accumulated and made up against them. And as for this double adduced, it must be altogether rejected; unless they can say, that the said two under-servants had an act of council, or other warrant from the then magistrates, for their doing the same, or that the principal contract is yet extant; and nothing can bind a debt upon the town except either a principal subscribed writ, or an act of their council. And if thir pursuers lost their double of the said contract, they would either have made their address to the town for getting a new double under the clerk's hand, or would have craved it by an exhibition. Yea, if they were in a proving of the tenor, this copy would be but a very mean and sober article or adminicle for instructing the same; and therefore, since they are not able to produce the principal contract, the town can never be reputed debtors therein; or, if they were, there be many pregnant and unanswerable presumptions for its having been paid, which we use not here as a defence apart, but as qualifications to enforce why this double should not sustain.

To all this it was REPLIED, That they confessed a writ attested by two ordinary notaries, was not effectual to wreath a debt on the neck of any except the authentic were produced; but we were in a more concluding case, which had these singularities, viz. that the said Lady Yester's mortification was a thing notour to the haill country; and so, it being fixed that it once was, the town must shew where they satisfied it. Next, the persons who attest this double are more famous, and so more credit is to be given to them than to common notaries; and, which is most

of all, they are the town's own servants and under-clerks, and so we less suspect to have done anything to their prejudice.

To this was DUPLIED, That the singularities adduced inferred no disparity; and, notwithstanding thereof, this deed could make no more faith than if it had been done by two common notaries; because they denied the notoriety of the said dotation, as also allege, that notaries must necessarily be as famous persons as they. And whatever faith clerks, or their servants, may have, as to any acts that are relative to or depending anyway on processes, (which be *actus officii*,) yet as to the attestation of writs, (that being altogether extraneous and eccentric,) they can be in no other rank but that of common notaries, and so, by their own concessions, should make no faith.*

The Lords *in presentia* found, the attested double produced, notwithstanding all the singularities alleged, was not a sufficient title for constructing the debt; but, if they would raise an exhibition against the present magistrates' clerks, or others whom they could imagine to have the said principal contract, they would sustain the same; and, if they succumbed in the exhibition, they would indulge them the favour to convert this their action for payment into an action for proving the tenor of the said contract, and to propone a tenor by way of reply. They also reponed Louthian to his oath, he paying the expenses (viz. L.5 sterling) they were at in summoning him and extracting the act.

Advocates' MS. No. 236, folio 107.

1674. *January 28th.*—AT the same time, the Lords falling to advise the action pursued by the Poor of Jedburgh against the town of Edinburgh,—see the full debate *supra*, the 4th of November, 1671, No. 236,—where the Lords allowed the pursuers to propone a reply of the tenor of that contract between the town of Edinburgh and the Lady Yester, and to prove it by way of reply: whereupon they having led many witnesses, and their oaths being advised, the Lords found the tenor of it sufficiently made up and proven, and, therefore, decerned the town in payment of the sum, reserving their relief as accords against the Earl of Louthian; which they did, the said contract being *notorium*, consisting in the knowledge of some of the Lords, and many other persons living.

What made it severe was, that it seems of dangerous preparative to allow the making up the tenors of personal bonds for sums of money, where the universal custom is to give back the principal bond upon payment, and cancel it without having any discharge; which bonds may be again made up at this rate: especially considering there are no adminicles in writ to astruct it, as horning, arrestments, or other the like diligences or writs narrating it; nor is the *casus omissionis* proven, which necessarily ought to be done in all tenors. See Dury, 19th July, 1636, Lords Frendraught and Bamf, where the Lords were very shy to admit the making up of a back-bond; yet they sustain it, only there be some difference: 1*mo*, There were adminicles in that case; 2*do*, It was referred to the party's oath. See Craig *Feud.* p. 140, and the laws there cited. But, what took off all inequity and harshness of this sentence was, that the pursuers found at last the principal contract, which stopped the mouth of clamour.

* See *De actibus causæ et judicii.* Stair's Decisions, 16th July, 1661, Lieut.-Colonel Osburne.

I heard Sir George Lockhart brisk to the King's Advocate, who was defending what the Lords had done in this case.

Advocates' MS. No. 438, *folio* 231.

1674. *January.* Captain JOHN HOME of Plendergaist *against* HOME of Linthill.

UPON a bill given in by Captain John Home of Plendergaist *against* Home of Linthill, the Lords ordained Linthill summarily to depone anent the receipt of 2000 merks from one Home lately dead, without giving any receipt or discharge of it. Which was inveighed at, as what rendered all summonses needless, where I am to prove a thing by the party's oath; for that privileged way of tabling matters was hitherto only known and practised against agents or members of the session: yet with the Emperor Antonius, *Licet non facile aliquid est mutandum de solemnibus, tam enubi æquitas poscit subveniendum est,* l. 7. D. *de In Integrum Restitutionibus.* But at this time the humours of people were so disposed to cavil, by an overboiling passion and thirst after a redress of grievances, (the story whereof, see *alibi,*) that scarce anything could escape censure.

Advocates' MS. No. 439, *folio* 231.

1674. *February.* MAYNE *against* HAMILTON of Baderston.

IN the suspension, Hamilton of Baderston *against* Mayne, one of the reasons being, that the sum charged for was arrested in his hand at the instance of a third party,—which was not offered to be proven by the messenger's copy, as it ought to be, but by the charger's oath of knowledge that the said sum was arrested in his hands by, &c.—it was contended, it was not so probable, but only *scripto;* no more than such judicial and legal instruments could be proven by witnesses: *argum. legis,* act 95, Parliament 1579, where the tenor of letters of horning, and their executions, are ordained allenarly, for the future, to be proven by writ.

Advocates' MS. No. 440. *folio* 231.

1674. *February.* The DUKE and DUCHESS of HAMILTON *against* GAWIN LOUDON.

IN an action pursued by the Duke and Duchess of Hamilton *against* Mr Gawin Loudon, as representing his father, who was one of the chamberlains of that estate, and had not made faithful count and reckoning; it was objected against the Duke's

active title, that he had no sufficient interest; producing allenarly the commissary's license to pursue, without a decreet dative; for, though he was not obliged to confirm it till he saw if it was recoverable or desperate, yet he ought at least to be decerned in executor to Duke William.

I think this inchoat title was not sufficient to sustain his interest; and the offering to produce it *cum processu* should not serve the turn. Hence a compriser, pursuing an improbation of the rights of the lands, shall infeft himself after the summons of improbation, (for improbation of the right of lands cannot be pursued but by one that is infeft, and so it must be otherwise in improbation of bonds,) it will not accresse, or convalesce, or retrotract; but that summons will be casten. Hence a man pursuing for himself, and as assignee, the summons was casten on informality; because the assignation was found to be subscribed of a date posterior to the date of the summons; for the President called this *filius ante patrem*. It was decided in a case in 1669. Yet see Dury, 20th March, 1623, Heirs-of-line of the Lord Yester *against* the Lord Buccleuch. *Vide infra, num.* 574, § 9. [June, 1677.] See Dury, 4th February, 1630, Earl of Kinghorne. See the case of an inchoat title, and an apparent heir's calling for exhibition of moveable bonds, in the pursuit at the instance of Patrick Fyffe's bairns, mentioned *alibi* in a book containing miscellaneous observes. *Vide infra*, July, 1676, Laird of Drumailzear *against* his brother, the Earl of Twedale, No. 490.

Advocates' MS. No. 441. *folio* 231.

1674. *February.* ROBERT DOUGLAS, minister of Bothwell, *against* HAMILTON of Parkhead.

MR ROBERT DOUGLAS, minister at Bothwell, charges Hamilton of Parkhead on a bond for 300 merks. Amongst the reasons of suspension this was one, that the extract of the bond produced was not probative, being only registrate in the town-court books of Renfrew, within which town or its jurisdiction he never lived; and though a decreet of registration of a bond was a decreet of consent, yet if it was given by an incompetent judge it was null. (*Vide infra*, July, 1667, No. 610.)

ANSWERED,—The suspender had renounced the *competentia et exceptio fori*, by agreeing in the clause of registration, that it should be registrate in the books of Council and Session, or any other Judge's competent within the kingdom.

REPLIED,—That still he behoved to be competent.

The Lords passed over the irregularity of the registration.*

Advocates' MS. No. 442. *folio* 231.

* But, in form, the least they can ordain is, that the principal bond be produced *cum processu*; which I have seen done.

1674. *February.* ALEXANDER BIRNY *against* GORDON of Aberzeldie.

MR ALEXANDER BIRNY, advocate, pursues Gordon of Aberzeldie, upon a bond of pension he had given him of 100 merks yearly, to do his law affairs.

ALLEGED,—It was of the nature of a factory, or a donation, and so revocable at will.

ANSWERED,—Opponed the constant tract of the Lords' decisions, finding pensions valid and obligatory as remunerations, even where the party deserts his employment, in contemplation whereof the pension was first constituted; since it might sustain, as an acknowledgment of bygone services, as Stairs, in his System, *tit.* —, Of Annualrents, § *ultimo,* shews the Lords have decided. And, in fortification of the bond insisted on, he produced letters under the defender's hand, recommending the prosecution of the particular affairs therein mentioned to him.

The Lords sustained the bond of pension, and pursuit raised thereupon; and found nothing relevant to take it away, but either refusing and declining to serve him, or malversation, and ingratitude, if great; this being *donatio remuneratoria.* Dury, *25th March,* 1629, *Doctor Strang; 24th July,* 1678, *Mr William Weir* against *Calander.*

Advocates' MS. No. 443. *folio* 232.

1674. *February.* RICHARD LOUTHIAN *against* LOUTHIANS, &c.

RICHARD LOUTHIAN, merchant in Edinburgh, for himself and as administrator to Alexander Louthian, his son, pursues Catharine, Alison, and ———, Louthians, as heirs, and upon the other passive titles, and Mr Matthew Ramsay, husband to the said Catharine, for his interest; to ratify the right and disposition of some lands in Edinburgh made to the said Alexander, by George Jolly and Alexander Louthian, his nearest heir, and brother to the said Catharine, Alison, and ———, Louthians.

The DEFENCE was, *Quoad* Alexander their brother, they offered to renounce to be heirs to him: And as to George Jolly, though they were heirs to him, they cannot ratify that his deed in favours of the pursuer, because it is a right granted by him on deathbed, and to their prejudice who are heirs, and is under reduction at their instances upon that head; and which is ready, and they are content to hold the production satisfied, and debate the reasons presently.

Whereunto it was REPLIED for the pursuers, That they will not suffer the defenders to renounce their being heirs to Alexander Louthian their brother; because they insist upon the passive title of being successor *titulo lucrativo post contractum debitum,* in so far as Catharine and Mr Matthew, her husband, accepted a disposition of sundry tenements of lands from the said Alexander, after his ratification and obligement to the pursuer, and thereupon was infeft, and has sold and wadset the said lands. As to the second, crave they may be decerned to ratify as heir to

George Jolly, and reserved their reduction of the right the pursuers derive from the said Jolly, as accords.

DUPLIED for the defenders, They cannot be liable as successors, 1*mo*, Because that is an universal title, and supposes an immixtion *per universitatem*, which the acceptation of this disposition will not imply. *Secundo*, That passive title is only introduced in favours of those who are creditors for onerous causes before the said lucrative succession, and not in favours of those who acquire rights for love and favour, as the pursuer's right was. But, *tertio*, That passive title reaches only such as are *alioqui successuri et necessario hæredes*, as when the father or son dispones to their eldest son or grandchild; but not where the party receiver of the disposition is only *hæres præsumptive et probabiliter tantum*, as when a sister succeeds to a brother, which is our case; and that it was a certain principle, that lucrative succession was not a passive title except in the line descendant. (*Vide supra*, February, 1670, Whytfoord of Milnetown, No. 8.)

TRIPLIED for the pursuers, The defenders must be reputed as *necessario hæredes* to their brother, because at the time he made them that disposition he was on death-bed, and could have no other heir, *per rerum naturam*, being also unmarried. *Secundo, Esto*, That succession were not enough to make them liable to all their brother's debts; yet the Lords were in use to [find] always such successors liable in *quantum lucrati sunt:* and they sought no more.

QUADRUPLIED for the defenders, That though he had died instantly upon the making that disposition to them, yet it would not alter the case. As for the second, though they were liable in *quantum lucrati sunt*, that was not competent here, but only in a reduction or in a declarator; and it was not in all their libel.

QUINTUPLIED for the pursuers, That they might add it or reply upon it, since it was unexceptionably relevant, *et lites non sunt prolongandæ seu multiplicandæ.*

My Lord Gosfoord FOUND they could not propone upon it here, since it was not libelled, therefore repelled it, reserving to the pursuer their reduction and declarator upon that ground.

See the information of this cause beside me. See 15*th June*, 1678, thir parties, *Louthians;* 19*th December*, 1678, *Setons of Blair against Pitmedden.*

Advocates' MS. No. 444, *folio* 232.

1674. *February* 28. The MARQUIS of HUNTLY *against* HIS FEUARS.

A second appeal was given in to the Lords by the Earl of Aboyne as commissioner, and in name and behalf of the Marquis of Huntly, his nephew, in an action pursued by the Marquis against Gordon of Carneborrow, and sundry others his feuars, for reducing their feus, as having fallen under his forfaulture, they not being confirmed by the King.

The Lords found the defender's feu-infeftments good, valid, and sufficient to defend against the forfaulture; especially the apparent heir of the person forfaulted being restored, and the forfaulture *funditus* taken away as *ab initio* null and unjust, and the restitution being *non per modum gratiæ*, but *justiciæ*. See *supra*, No. 406, (June, 1673, General Dalzeel *against* Tenants of Caldwell,) 437, (28th January, 1674, General Dalzeel *against* Tenants of Caldwell,) where the Lords

maintain tacks against a donatar to a forfaulture. See *Hippolitus de Marsiliis singulari*, 122, where he defends that *propter domini delictum vassallus nequit feudo privari.* See Stair's System, *tit.* of Infeftments, §. See a discourse *apud me*, why neither the creditors, cautioners, nor vassals of forfaulted persons should be prejudged or be cut off by the forfaulture; it is elegantly enforced, folio 68 *et sequentibus.* And though, in strictness of rigour, by the feudal law, and nature of that contract, the fee reverting and opening to the superior by delict, it returns, *prout optimum maximum est*, as it was given out, without noticing any incumbrances contracted upon it since, except the over-lord had acknowledged, accepted, and owned them, by giving his consent or confirmation, or by admitting resignation in their favours; yet our law has oft inclined to a mitigation and temperament in this point, by mingling a little equity; lest otherwise, faithful, loyal, and innocent subjects be put to suffer, without any other fault than an omission of a nice punctilio of form. See act 37 in 1571; act 130 in 1592; act 201 in 1594; act 3 in 1600; and the rescinded acts, 33 in 1644, and 9 in 1645.

When the Marquis returned from the French camp, my Lord Lauderdale persuaded him judicially to compear before the Lords of Session, and take up his appeal and declare he past from it; and which he did on the 26th of January, 1675. And though they had promised him not only a new hearing, but gave him some insinuations to hope a redress, yet, after a second debate, they adhered to their former interlocutor, and so he was either ill or well served for his complimenting them. But the times were such as no rational man could expect a ratification from them of what had once escaped them, though unawares. They blushed to confess what is incident to humanity itself, (*nam humanum est errare,*) where their honour was once engaged at the stake; lest they should inflame, foment, and encourage the insolence of many who were watching for their halting: and which censoriousness was improven to that height that they were ready of molehills to make a mountain, by turning to themselves the wrong and magnifying end of the prospect; and even to name and stamp what is just, legal, and warrantable, not with the pardonable nickname of an error and frailty, but even with the most intolerable and ignominious brand of downright injustice, partiality, and subversion of the interest of the subject, and the settled laws of the kingdom.

Advocates' MS. No. 446, § 1, *folio* 234.

Anent the APPEAL to the King and Parliament presented by LORD ALMOND, against an Interlocutor of the Lords of Session, in the case, THE EARL OF DUMFERMLING *against* THE EARL OF CALENDAR, *in February* 1674. See that case.

Notwithstanding all the pains was taken on the Lord Almond to pass from his appeal, and take it up, yet nothing hath hitherto prevailed with him to make him do it, but he lives in hopes to make it rise up in judgment against them whenever we get a fair and unprelimited parliament: which may be long enough ere we see it. *Vide practicam præcedentem; infra, num.* 479, (Tenants of Bathgate, June, 1676;) *supra, num.* 122, (Earl of Argyle *against* Campbell, February 2, 1671,) and 156, (Hamilton *against* Bell, 25th February 1671;) *infra, num.* 487, Bishop of Dumblaine *against* Kinloch, July, 1676.

Advocates' MS. No. 446, § 2, *folio* 235.

I HAVE few or no observations by the space of three Sessions and a half, viz. from June 1674 till January 1676; in regard I was at that time debarred from my employment, with many other lawyers, on the account we were unclear to serve under the strict and servile ties seemed to be imposed on us by the King's letter, discharging any to quarrel the Lords of Session their sentences of unjustice, and was not restored till January, 1677; so that we shall content ourself with remarking a few things that occurred in that gap and interval.

Advocates' MS. folio 235.

1674. *June.* GEORGE YOUNG *against* GEORGE COCKBOURNE.

GEORGE YOUNG, bailie to the Earl of Winton in his barony of Niddry or Winchbrugh, pursues George Cockbourne, who had possessed the yards and park, for payment of the duty thereof for the years of his possession; in which the quantity of the yearly rent being controverted, I contended, the *quota* paid for the preceding years behoved to be the rule, where no particular farm (tack-duty) was pactioned and conditioned; for *consuetudo in pensionibus est servanda, L.* 18, *C. Locati, ibique Glossa magna Accursum,* who cites Everhardus, *in loco legali a solitis.*

See Benevenutus Straccha, *tractatu de navibus, parte* 3, No. 10, *pagina* 306. *Infra,* 8th November, 1677, Prestongrange, No. 649.

Advocates' MS. No. 447, *folio,* 235.

1674. *June.* ANENT USURY.

ABOUT this time I heard it queried, if it was usury to take more annualrent from the King, in advancing him money, than 6 of the 100. Sir George Lockhart was of opinion, in a contract with the King, it would fall under the compass of usury; but where it is done by way of traffic, merchandising, or bills of exchange, even *centesimæ usuræ,* which is 12 of the 100, might lawfully be taken: as both Sir William Sharp and Sir Patrick Morray had practised, when they lent some money for defraying the charges of the Commissioners to the Union in 1670; the L.30,000 Sterling imposed on the country by the Parliament for that end, not being so soon got up. Some may think, may not the King give as much annualrent as he pleases? He is not tied by these positive statutes; he is above the municipal laws; he may dispense with them in his own particular. I confess he may gift as much as he thinks fit; but to pay money, *nomine usuræ,* seems unsafe to the receiver: seeing in these acts, *rex utitur jure privati; et tanquam minor et læsus,* he may be restored. See Guibertus Costanus, *cap.* 1. *Quæstionum, et Titulum Cod. de fiscalibus usuris, ibique Ant. Perez in commentario.*

Advocates' MS. No. 448, *folio* 235.

1675. DOUGALL M'PHERSON *against* MURRAY; or rather, THOMAS LUNDY *against* SIR JAMES KEITH of Caddom.

IN the action mentioned *supra*, at No. 216, between Murray and M'Pherson, [12th July 1671,] or rather Mr Thomas Lundy and Sir James Keith of Caddom, we will find a comprising was there quarrelled as null, on the following grounds:— *Primo*, That the creditor who was to lead the apprising had, upon a bill given in by him to the Lords, obtained a dispensation to hold his court of apprising at a place in the open fields called the Beechhill in Angus, (which I conceive was craved as nearest to him, to save charges;) and which place was neither on the ground of the lands to be apprised, nor at the chief burgh of the shire where the lands were situated, nor was it within the shire where they lay, nor at Edinburgh, which is the *communis patria* of all Scotsmen, and, where lands in sundry shires are to be apprised, is ever made the place, but was in the open fields and in another shire; at which rate, one may apprise lands situated in Leith or Edinburgh, in Lochaber or Orkney, by which they may be both clandestine and remote. *2do*, The comprising was questioned, in so far as it was not led and adduced on the day prefixed by the messenger, but he had prorogued and continued the diet at his own hand; which being peremptory, and he only as *judex pedaneus*, seemed unwarrantable for him to do: yet the macers in service of heirs, *ex justis causis*, will continue; and the style containing a messenger's warrant, empowers him to affix diets, one or more. The Lords went over them both, and sustained the comprising, yet looked upon them as enormities and irregularities they would not sustain for the future; and ordained the appriser to condescend in special on some reasonable causes why the messenger deserted the first diet he set. In obedience whereto they condescended, *1mo*, That the messenger was so drunk he was not capable to officiate. *2do*, Being in the open air, there was a great rain that would have spoiled all their papers if they had offered to proceed. Which excuses the Lords accepted of; but they found it absurd that a messenger should have power at his pleasure to prolong the comprising, which, at that rate, he might dwang and delay for a year or more, and defraud persons of their just diligences.

Advocates' MS. No. 452, folio 237.

1675. *December 2.* HEW KELLO and WILLIAM HALLY *against* AGNES KELLO and JAMES MAR, her Husband.

IN an action pursued by Hew Kello and William Hally, his assignee, against Agnes Kello, daughter of umquhile John Kello, and James Mar, her spouse, for payment to him of 1000 merks, owing by her father, and whom she represented on the passive titles; and particularly insisting against her as lawfully charged to enter heir, she offered to renounce.

IT WAS ALLEGED she could not be heard, because *res non erat integra*, in so far as she had granted bonds, whereupon, by collusion and subjecting herself to the jurisdiction of the Bailie Court of Edinburgh, whereunto she (dwelling in the Water of Leith,) was not answerable, decreets were recovered against her; and upon her

renunciation to Jo. Nasmith, who had right to these bonds by progress, he had adjudged her father's estate from her: by all which she had incurred gestion.

ANSWERED,—1*mo*, That Nasmith's adjudication was led, not only upon a bond granted by her who was now apparent heir, but also upon a bond of her father's. Neither can the granting of that bond be interpreted a behaviour, seeing it was in her father's lifetime, and then she was not apparent heir. And as to the qualifications of collusion drawn from her appearing before the bailies of Edinburgh, to whose jurisdiction she was not liable, and that *actor regulariter sequi debet forum rei*;* it is ANSWERED,—The Bailie Court of Edinburgh was *forum competens* to her upon all those grounds of law by which *quis forum sortitur*. For, 1*mo*, She was subject to it, *ratione domicilii et originis;* for as she was born in it, so she dwelt in the Water of Leith, within the town's territories. Though it may be answered to this, that the Water of Leith answers *in civilibus et criminalibus* to the shire; and though, as being a part of the town's common good, it makes them answerable to the head courts of the barony and regality of the Cannogate, whereof the town of Edinburgh are superiors, yet it made not the inhabitants within that bounds liable to the Bailie Court. 2*do*, It was *forum competens* to her, *ratione contractus*, the debt being contracted in Edinburgh. 3*tio*, *Ratione situs rei controversæ;* for the tenements of lands craved to be adjudged lie within the town of Edinburgh. 4*to*, The tribunal was competent, *ratione consensus et prorogationis judicis; nam primus actus judicii est judicis approbatorius, et magistratibus Edinburgenis jurisdictionem conferebat in eos consentiendo.*

See thir at large in *Gudelinus de Jure novissimo*, p. 155, 156, et seq. *Vide* Durie, 28*th November* 1635, *Williamsone*. See 28*th November*, 1679, *Straiton* and *Bell*. See the informations of this cause beside me. See the informations in the action Sir Robert Murray *alias* Crighton *contra* Richard Murray of Brughton, *apud me*. *Vide infra*, *December*, 1676, No. 522, *Haliburton* and *Balmerinoch*.

The Lords, upon the report of the debate by the Ordinary, FOUND, on the foresaid day, that the collusion insisted upon by the pursuers was not a sufficient ground to fix a passive title upon the defender; but prejudice to the pursuer, upon that ground to reduce any decree of preference obtained by Nasmith, upon the foresaid collusion; and find the defender's giving bonds does not put her in the case of the act of sederunt made in the action Glendynning *contra* the Earl of Nithsdale, unless the pursuer will allege that she, or some other person for her behoof, has possessed her father's lands, and intromitted with the maills and duties thereof.

In this cause it was CONTENDED, she had behaved, in so far as she had meddled with the writs of her father's lands, and other his evidents. ANSWERED, *Non relevat*, unless you say, she had made use of them, by assigning them, or uplifting farms or sums by them, or pursuing or defending upon them; for the Lords have found a naked meddling with writs no *gestio pro hærede*, Dury, 8*th July*, 1628, *Dumbar*. Yet, *vide supra*, 29*th June*, 1670, *Casse* and *Eleis*, No. 40, where intromitting with a charter-kist was found sufficient to import behaviour; only that was *immixtio per universitatem*.

In this same cause, in February, 1676, William Hally, having raised reduction of Jo. Nasmith's adjudication, on the ground of collusion, mentioned in the Lords' interlocutor aforesaid, and taking a decreet *cognitionis causa*, and thereafter a decreet of adjudication upon the apparent heir's renunciation of the same tenement already

* Locus situs rei controversæ *is* forum competens apud Gallos. *Joannes Imbertus Institutionum forensium, libro* 1, *cap.* 22.

adjudged by Jo. Nasmith; and compearance being made by Jo. Nasmith to stop his diligence, on the allegeance of payment of part of the sum for which he was taking out his adjudication: the Lords refused to revoke the same *hoc loco*, either against the decreet *cognitionis causa*, or the decreet of adjudication; (see this marked in other papers *alibi*;*) upon this reason, that they judged it calumnious, and designed merely to postpone, stop, and delay the pursuer's inchoate diligence, which they would not allow; and, therefore, resolved and enacted, that both the old adjudications upon decreets *cognitionis causa*, and the form of adjudications introduced in place of comprisings by the act in 1672, shall be summarily decerned without inrolling, (though this seems contrary to the regulations,) or receiving any defences that formerly were competent against the adjudication itself; reserving all defences and objections, competent to be proponed against the debt, to the action for maills and duties, or to a competition in a suspension of multiplepoinding; so that they now pass of course, *absque ullâ causæ cognitione*.† And as they have made an act of sederunt upon this, so they follow and practise it in judging.

In June, 1676, when Jo. Nasmith's process for maills and duties, upon his infeftment and decreet of adjudication, was called before the Lords, Hally compeared, and repeated his reasons of reduction against Nasmith's adjudication by way of defence.

ANSWERED,—They could not come in in this action for maills and duties, his reduction being only seen, and returned, and inrolled, and not yet called, nor a term taken; much less the production satisfied, or a warrant *in præsentia* to the Ordinary in the Outer-House, to hear and discuss the reasons, without which they were not receivable, else reductions should prove vain and elusory points of form. *Vide infra*, No. 467, (24th February, 1676.)

This being taken to interlocutor, the Lords ordained Jo. Nasmith to be answered of the maills and duties; he finding caution to make them forthcoming to any the Lords shall afterwards find to have best right; and particularly to Hally, who competes, if he prevail in his reduction; unless the said Hally will hold the production, as it is in the pursuer's process for maills and duties, as fully satisfied: in which case, ordains Nasmith to answer to the reasons of reduction *etiam hoc loco*, even by way of defence. But Hally finding only the seasine produced for the active title to instruct his interest to the maills and duties, and that neither the decreets *cognitionis*, nor of adjudication, nor the bonds whereon it proceeded, were *in campo*, against which mainly his reasons of reduction upon collusion and nullity militated; he would not accept of the condition of the Lords' interlocutor: whereupon Nasmith got forth his decree for maills and duties; though, in effect, they are but consigned, deposited, and sequestrated in his hands, till the event of the reduction: concerning which, see *infra*.

Advocates' MS. No. 453, folio 237.

* *Infra*, Harperfield and Bannatyne of Corehouse, (1st January 1678, No. 700.) See 13th February, 1680.

† Adjudications on a decreet *cognitionis causa* must have two diets for citation, and pass upon a bill, else they will be casten as unformal. *Infra*, 1st August, 1677, Cathcart, No. 684.

January, 1676.

The Advocates debarred being restored upon the 10th of January, our Collection and Observes return to their former orderly channel.

Advocates' MS. folio 238.

1676. *January.* DOUGALL M'PHERSON *against* ———

A HUSBAND sells land; and obliges himself, in the disposition, to obtain his wife's consent, she being infeft therein. She utterly refuses to consent. He is charged, denounced, taken with caption, and imprisoned, on the not implement of that clause. He offers to refund the price he got, *cum omni causa.* QUÆRITUR, When *factum in obligatione deductum* becomes imprestable, at least *valde difficile*, if *venditor fungitur et liberatur præstando interesse. Jure non licet a contractu perfecto resilire, nec est locus pœnitentiæ: initio, est voluntatis, postea fit necessitatis, L. 5. C. de Obligationibus et Actionibus.* If the Lords, *ex jure prætorio*, by a mixture of equity, would repone them each to their own place, *nescio.* But if he can find caution, or give warrandice in case of the existence of a distress, by her evicting her liferent upon his decease before her, I think it should assoilyie and satisfy, since *dubius est eventus* if ever she has right to that land sold and disponed. But I think the Lords would not force her to consent, unless the husband offered her as much elsewhere, uncontroverted and clear.

They say, the parties were Dougall M'Pherson and ———

Advocates' MS. No. 454, *folio* 238.

1676. *January.* ANENT THIRLAGE.

THE Lords found a clause in the reddendo of a feu-charter, *pro alio omni onere et consuetudine*, sufficient to liberate from astriction to a mill; though neither in the dispositive clause, nor in the *tenendas*, there was the least word of the clause *cum molendinis et multuris.* See the contrary of this decided, in Dury, 17*th July*, 1629, *Newliston.*

Adocates' MS. No. 455, *folio* 238.

1676. *January.* ALEXANDER RITCHIE *against* WAUCHOP of Dreghornie.

ALEXANDER RITCHIE having obtained a decreet for poinding of the ground of the lands of Dreghornie, upon an infeftment of annualrent furth thereof, (which

vide supra, the 24th of July, 1668;) and Wauchop of Dreghornie having granted a base infeftment and disposition of his property to his son *in familia*, before the heritable bond; and Ritchie having raised reduction thereof upon the 105th act in 1540, and Dury, 17*th July*, 1635, *Craighall* contra *Bothwell:* it fell to be doubted, how the son should be summoned on the reduction, since his father concealed and abstracted him, so that they knew not where he stayed.

The Lords, upon a bill given in to them, inclined to find he might be summoned at his father's dwelling-house, at the Market-cross of Hadinton, within which it lay, at the chamber where he resided when he came to Edinburgh, and at the Market-cross of Edinburgh and pier and shore of Leith, or other such particular places as he was known to haunt, frequent, or resort to formerly, since he was *latitans et vagabundus;* and that they would sustain it as equivalent to a citation given personally, or at his dwelling-house. See Hadington, 7*th December*, 1622, *Jamieson* contra *Ker*.

Advocates' MS. No. 456, *folio* 238.

1676. *January.* ANENT VITIOUS INTROMISSION.

THE Lords, about this time, found, the taking a gift of escheat was not sufficient to purge preceding vitious intromission; unless there be a general declarator obtained upon it, before the intention of the creditors' action against the said vitious intromitter, now donatar. *Vide supra*, 10th January, 1672, No. 292.

Advocates' MS. No. 457, *folio* 238.

1676. *January.*

WHERE improbation is raised of a writ, and the defender in the improbation raises an action for proving the tenor of that writ, and condescends on the *casus amissionis;* the dependance of the action anent the tenor will scarce be relevant to stop certification in the improbation. So Hadinton, *anno* 1612, *decisione* 518; *item* 592, *foliis* 59 *et* 67.

2*do*, It is QUERIED, If a special service, without a general, gives a man right to heritable bonds, upon which no infeftment has followed; and if a special service, *tanquam majus*, contains a general service *sub se tanquam minus*, *L.* —. *D. de Regulis Juris.*

3*tio*, Of old, and through all the tract of Dury's Practiques, an apparent heir got always exhibition of all writs whatsoever, for inspection *ad deliberandum;* but now the Lords have restricted and explained it, by their decision in 1662, between Tailfer and Shaw of Sornebeg. See it in Craigie's Collection, folio 68; in Stair's System, tit. —. *Of heirs*, § —; and in his Decisions, ———, 1662; *supra*, 14th July 1671, No. 221

Advocates' MS. No. 458, *folio* 238.

1676. *28th January.* STRANG *against* HAMILTON.

IN a pursuit for breach of arrestment, pursued by one Strang *contra* Hamilton, the Lords found, that the carrying away of corns, and stacking them for preservation, after an arrestment had been laid upon them by one who had an infeftment of annualrent furth of the lands whereon they grew, was no breach of the arrestment; but where the arrestment is laid on by the master of the ground, then found the removing the corns off the ground of his lands to any other place would import a breach of the arrestment: for the drawing all the stoucks to one rig, or stacking them in a barn-yard, to preserve them from beasts or weather, is *utilis negotiorum gestio*, and makes the arrester's condition better; and it were ridiculous to allow him the power to quarrel it, unless imbecilment [embezzlement] can be made appear. *Infra*, No. 496, § 2. [Balfour *against* Pidgeon, 10th October, 1676.]

Advocates' MS. No. 460. *folio* 239.

1676. *January.* ANENT MINORS AND THEIR CURATORS.

THE Lords have authorised tutors to sell their minors' lands within burgh, by their decreet, at ten years purchase, and booths at twelve years; because, 1*mo*, They set more surely than other dwelling-houses. 2*do*, Are not so subject to fire. 3*tio*, Put the proprietor to no expense in roof-reparations, or keeping water tight and wind tight. As for the lands in the country, they have authorised the tutors to sell them at seventeen years purchase; which is just the annualrent at six of the hundred, and equals the stock in some less than seventeen years.

I have heard it queried, If the tutor or curator of him that is heritor in a forty-shilling land can compear for his pupil, and give his vote to the Commissioners of Parliament at the head Court. I think not: for he cannot be chosen, neither being an heritor, freeholder, nor infeft; *ergo*, he cannot choice. As for the heritor himself, he cannot, in strict law, be admitted to vote till he be major and twenty-one years complete. 3*tio*, We follow the civil law in not being strict in exacting caution from testamentary tutors, *quia judicium defuncti eos approbavit;* but they make only faith and give up inventory, conform to the 2d act of Parliament in 1672; but if that tutor confirm the defunct's testament, or turn somewhat suspect, as being poor or malversing, I think, in these cases, he ought to find a cautioner.—See Gudelinus, *de Jure Novissimo*, lib. 1, cap. —. p. 41. See Stair, tit. —. *Of Tutorial Obligations*, § —. *Codex Fabrianus*, libro 5, tit. 25, *de Tutore vel Curatore qui satisdationem non dederunt, defin.* 1.

Advocates' MS. No. 461. *folio* 239.

1676. *February.* SCROGIE, BISHOP of ARGYLE *against* ———

THE Lords FOUND, in the case of Scrogie, Bishop of Argyle, that in transportation of ministers, it was not the date of the presentation or collation that made the kirk vacant from which he came, but his institution in the church to which he went: that being like seasine, that consummates the act, and puts him in possession, and is sometimes by the canonists called *Beneficii Investitura;* so that the institution stops the vacancy of the church *ad quem,* and, in lieu thereof, the vacancy of the church *a quo* takes its commencement, unless it be also filled and supplied *ex incontinenti.* And the legal term of payment of minister's stipend being, by the act of the General Assembly at Montrois, (see the copy of it beside me,) in 1585, at Michaelmas, *quia tunc fruges* (out of which the teind is due) *sunt a solo separatæ,* through all the kingdom, which is also followed in practice; then if a minister's institution or entry be any time before that term of Michaelmas, he gets the half of that year's stipend; the other half being either due for incumbency, or falling under the anne, or under vacancy, and so will be due to the Colleges, conform to the late act of Parliament in 1672. See also the act of the same Parliament 1672, anent the anne, and my observes on it.

QUÆRITUR, If the glebe, as a part of the stipend, falls under the anne. *Videtur quod sic, nam lex non distinguit. See Dynus Mugellanus, in commentario ad regulas* 1 *et* 2, *Juris Canonici, in* 6 *Decretalium.*

Advocates' MS. No. 462, § 1, *folio* 239.

1676. *February.* The BISHOP of EDINBURGH *against* SIR A. COCKBURNE of LANGTON.

QUÆRITUR, If the patron of a kirk, to impede the *jus devolutum* to the king or bishop, present before the elapsing of the first six months after the vacancy, one that either embraces not or is not received by the bishop, and thereafter lets it lie over till near the end of the other six months, and siclike presents a person either unwilling to come, or not qualified; he seems fraudulently to shift and tergiverse, and to present only to save his right, and will not hinder the *jus devolutum* any longer; and the church ought not to stand unprovided at his pleasure, but a certain time may be limited to him within which he must effectually present, otherwise omit it *pro hac vice.* This was contended by the Bishop of Edinburgh in Sir A. Cockburne of Langton's case, who kept his kirk vacant by the space of two or three years, by the aforementioned artifice, because he could not get an indulged minister; at last he was forced to accept of a conformist. *See Gudelinus, de Jure Novissimo, libro 6to seu ult. cap.* 8*vo, ubi tractat de Jure Patronatus, pag.* 340. *See act* 115, *Parliament* 1592.

If the bishop present not within six months, either in his proper patronage, or where the right devolves, then some affirm he omits it *pro ista vice,* and it transmits to his superior archbishop, and he neglecting, to the king.

Advocates' MS. No. 462, § 2, *folio* 239.

1676. *February.* The MARQUIS of ATHOLL *against* ———

THE Marquis of Atholl, as donatar to the escheat of , pursues a declarator thereof. ALLEGED,—That the execution of horning was null, wanting both the date and place where the charge was given. ANSWERED,—They offered to abide at the charge as truly given: and for the defects, they would take up their execution, and amend and supply it both as to date and place; on which they condescended. *2do,* ALLEGED,—That the party is denounced at the wrong market-cross, viz. the regality, whereas he lived within the sheriffdom.

ANSWERED,—He behoved to reduce upon that head.

REPLIED,—They needed no reduction, because it was a nullity introduced by statute, and, *nullitas juris,* it was receivable by way of exception; acts 264 et seq. in 1597; and this is Hope's opinion in his lesser Compend. See Hope's Compend. cap. 12, anent Removings, *pag. mihi* 54 *et* 55.

DUPLIED,—It was a nullity truly consisted *in facto,* and abode probation, and therefore could not summarily be discussed *hoc loco;* and as for Hope, though a great lawyer, and to whose pains we are much obliged, yet all he has written is not canonic. *Vide supra,* 252, (11th November, 1671,) and No. 423, (Home *against* Craw, 11th November, 1673.)

The Lords declared in favours of the pursuer, reserving to the defender his reduction as accords.

2do, The Lords do not regard the act of Parliament, but find it in desuetude, and therefore do not annul hornings, inhibitions, or other diligences now, albeit they be not executed at the market-cross of the regality within which the lands lie: both in regard that formality has fallen in a general disuse; and, *2do,* because sundry regalities have no market-cross to denounce at.

3tio, Where a man dwells in a different shire from that wherein his lands lie, and he be denounced at the market-cross of that shire where he dwells, though not at the market-cross where the lands lie, and he abide year and day at the horn, his liferent escheat will fall. (*Supra, 11th November* 1671, No. 251.) In which point I found some lawyers in a mistake, because some denunciations are no ground of escheat, but only to found a caption; but these are when one is denounced, *ex. gratia,* at the market-cross of Edinburgh, within which sheriffdom he neither dwelt at the time, nor had any lands lying. See more of this at length in other papers beside me. Yet see *23d March,* 1630, Oliphant contra Earl of Marshall.

Advocates' MS. No. 463, *folio* 239.

1676. *February.* ANENT APPRISINGS.

I HEARD it questioned, if the first apprising can redeem the second and pay it, as the second appriser can redeem the first. *Videtur quod sic:* for the first compriser has all the right was standing in the debtor's person; *ergo,* he may purge and redeem as the debtor might have done. But it seems more consonant to the

analogy of law that he cannot, for he could not comprise the legal of the posterior apprising, because the time of the leading of his comprising it was not then in being, it was a nonens. *Vide* Dury, 18*th November*, 1624, *Kincaid and Haliburton.*

Cujace, *ad Titulum C. Etiam ob chirographariam pecuniam pignus tenere posse*, affirms from Accursius, and the laws there cited, that *primus creditor potest offerre debitum secundo. Vide February*, 1680.

To the argument for the first opinion it may be answered, he has all the right was standing in his debtor's person: but, *ita est*, this was not a right competent to the debtor then, because the second comprising was not then led, and so could not be carried with the first apprising. It may be replied, that the debtor had the power to pay that debt, whether personal or real, as personally bound for it, (if so be it was contracted before the denunciation of the first comprising,) *ergo idem jus competet* to the first appraiser. 2*do*, All right that accresces to the debtor becomes the first compriser's; *ergo, ex post facto*, this posterior right of reversion becomes his also. It may be duplied, that a comprising being a real right, will not draw, carry, nor affect the power and faculty to pay personal sums, seeing that is moveable. And for the accrescing, since all the favour indulged by the law to second comprisers that are not within year and day, (and before the act of Parliament 1661, whether he was within year and day or not,) is allenarly the right of redeeming the prior apprisings; why shall this be communicated to one who has far more considerable benefits, viz. the full right of property if the legal expire? And yet I cannot see how the second appriser should refuse payment; that purging his damage and interest, *cum omni causa.*

Vide supra, No. 154, [*February* 25, 1671,] where it is subtilely debated, if a liferent can be comprised, or an apprising not yet led be disponed. *See Hope's Compend. cap.* 10, *Of Comprisings, pagina* 49.

Advocates' MS. No. 464. *folio* 240.

1676. *February.* CAMPBELL *against* BLAICKWOOD.

ONE Campbell pursues Blaickwood in Awell for spulyie. His defence is, lawfully poinded. ANSWERED,—The execution of poinding is null, because, 1*mo*, Only subscribed by the initial letters of the officer poinder his name. 2*do*, It is apprised at the wrong place, and not at the market-cross of the jurisdiction where the lands lie of which the poind was taken. 3*tio*, It is but an informal minute; not bearing the names of the apprisers at the market-cross, nor any offer back of the goods to the party, nor that there was any apprising of them on the ground of the lands, as ought to have been done. REPLIED,—The initial letters are sufficient, because it is offered to be proven that it is his usual way of subscribing: which was found relevant by the Lords. See the like in Dury, 20*th January*, 1631, *Houston* contra *Houston.* Denied the second: whereon it was admitted to the pursuer's probation. As to the third, offered to get an extended execution of poinding at which they would abide as true in all the formalities thereof: which the Lords allowed, being to avoid a spulyie. See the information of this cause beside me.

Advocates' MS. No. 465, § 1, *folio* 240.

1676. *February.* ANENT POINDING.

I HAVE heard it maintained, that poinded goods, especially if they be a dead poind, that puts the creditor poinder to no charge or expence in keeping it, ought to be kept 24 hours ere they can be apprised at the market-cross, to wait if the debtor will come and relieve it, *medio tempore*, by payment of the sum for which it was poinded; and I hear the custom of Edinburgh is to apprise them three several market-days, before the creditor has an absolute right to them. (The act 2d in 1669 allows what is poinded for deficiency in out-reiking the militia, may be redeemed for six days after.) Yea, I have heard some go a greater length, to affirm, that for 24 hours after the apprising is past, the debtor may still, upon payment, redeem his own goods; which, if true, is undoubtedly introduced *humanitatis gratia*: so that though, by the apprising at the market-cross, the creditor becomes *dominus* of the apprised goods, yet it is a sort of *dominium revocabile* from him for 24 hours after. But I hardly think this *laxamentum temporis* would be indulged to a third party who offers, after the apprising at the market-cross is past, to come and make faith the goods are his, as having right to them by disposition, or as landlord, *jure hypothecæ*, but rather that he will be totally secluded. *Vide Feb.* 1680.

Advocates' MS. No. 465, § 2, *folio* 240.

1676. *February.* THURSTON'S CREDITORS COMPETING.

THE Lords, in February, 1676, determined in the case of *George Lawson, Bailie Carmichell, Captain Alison*, and other creditors of Thurston, competing on the priority of their diligences, that one who has a decreet for poinding of the ground, upon an infeftment of annualrent, can poind for no more than the tenant's year's rent, or what he is then owing to his master. Which, as it is most equitable towards the preservation of poor tenants from being harassed, herried, and for encouragement of labourers of the ground; so it is in effect no more than what is enjoined by the 36th act in 1469, discharging them to be distressed beyond a term's mail: and though the tract of decisions ran for a long time, that the said act of Parliament intended only to regulate poindings on personal debts owing by the master of the ground, but did not extend to, nor concern poinding upon a real right and infeftment; the nature whereof carried to the first and readiest of all was upon the ground, without regard what the possessors were owing resting to their master, or if the goods poinded were truly theirs, or belonging to other men, and there only a-grazing or casually; and this aye and while the poinder's annualrent was paid. See this *in terminis* found in Dury, 11*th July*, 1628, *Lady Ednem contra the Laird.* And though strict law may dictate this distinction, yet I think the Lords' resolution in this last case making no difference at all, by far the more equitable and just.

See *alibi*, where the Lords, *in July*, 1676, preferred the whole other creditors to Bailie Carmichell, because his right was granted by a bankrupt *postquam fugam arripuerat.*

Advocates' MS. No. 465, § 3, *folio* 240.

1676. *February* 24. ANENT SEASINES WITHIN BURGH.

THE Lords found it no ground of nullity or reduction whereupon to quarrel or impugn a seasine of lands within Aberdeen, being a burgh royal, that it was not found recorded in the town's books; for the Lords found no necessity of such recording, since it is not enjoined by the 16th act in 1617, that excepts burgh seasines from registration; for since none can give such seasines but the town-clerk, they will be found in their protocol-books, as to which they are at least obliged to be exact.

Advocates' MS. No. 466, *folio* 240.

ANENT REPETITION AND INDEBITI SOLUTIO.

WHERE a person obtains a sentence in his favour, if it appear another hath a pretence to that thing which is decerned to be given up, the law rationally secures the defender, by ordaining the victor to find sufficient caution to refund the thing, with its profits, in case the other competitor prevail, and be found to have best right, at least better right than the other. So appoints *L.* 57 *in duobus unam hæreditatem petentibus; L.* 57, *D. de rei vindicatione in duobus unum fundum vindicantibus; L.* 5, *p.* 19, *D. de Tributoria;* where an equal distribution is made of the goods, yet with caution to refund if other creditors emerge. And that which comes nearest of all to our practice, is *lex. ult, C. de Jure Deliberandi;* where, if legacies be paid and creditors afterwards appear, what was paid to the legatees may be condicted and repeated from them as *indebiti solutum:* only it is somewhat dubious, if the executors shall be liable, referring them to their relief of the legatars, or if the creditors must betake themselves to the legatars; and if they have been long silent, I think they should. See Dury, *25th July*, 1634, *Crawford* and *Mathisone; 6th March*, 1627, *Scot* and *Cockburne; 13th March*, 1627, *Ker* contra *Lady Covinton. Vide supra, 2d December*, 1675, (*Kello* against *Kello,*) *numero* 453, *in fine.*

Advocates' MS. No. 467, *folio* 241.

1676. *February.* MORISONES and SMALL *contra* ROBERT PATERSON, Writer in Edinburgh;

WHOSE author having apprised the lands of Dykes, and served an inhibition, did intent a reduction of some feus granted by Forsyth of Dykes to Morisones' and Small's predecessors: in which having obtained a certification for not production, they raised a summons of reduction of that certification: in which being reponed, and after production, it evidently appearing that the feu-rights were long prior to the inhibition, and thereupon craving to be assoilyied;

It was ALLEGED for Paterson, That he was content the absolvitor should take

effect, *pro futuro*, but as to the intermediate fruits and maills and duties of the land, they had uplifted and intromitted with, between the time of the certification that past against their rights and their intenting this summons *reductivè* to be reponed, they belonged to him, since all that time they had no right. He, as compriser, had the only effectual right upon the lands standing unreduced for the time.

This dipped upon a very pretty question, If a certification in a simple reduction gave him right to the rents of the lands in the meantime, aye till it were reduced. Paterson's advocates contended it did. For taking off which allegeance I offered, first, to demonstrate, that a certification in a simple reduction, can import no such thing of its own nature. *2d*, That the decreet of certification now founded upon and obtruded is so groundless and so null, in so far as concerns thir defenders, that it can never make them liable for bygones, or warrant so unreasonable a desire. As to the first, the true effect of a certification in a single reduction for not production is mainly this, that *medio tempore*, the writs against which it is granted, have no use either to defend or pursue upon, till the certification reducing them be rescinded by production; and till then, they cannot be obtruded against that right whereupon they were reduced: and which salves the just interest of a certification in a naked reduction, and makes it both useful and abundantly effectual, and there is neither law nor reason for making it operate farther; and it were strange to attribute so much to a decreet of certification, as either a *jus in re* or *ad rem* to all the maills and duties of the lands whereof the writs are reduced, where the reducer and obtainer of the certification neither attains the possession, nor does diligence for many years to get it, as in this present case. So that it is evident we do not elide and evacuate the force of thir certifications, or make them insignificant and useless, as is pretended, though we deny them the power the pursuer ascribes to them; for the certification decerns the writs shall be reputed null by a presumptive and illative nullity, aye and while it be produced; now the design is only, by this summary and equivalent manner, to force production: and which will attain its end very effectually, seeing none can be admitted, *ad agendum vel defendendum* on these writs, till they be produced in a new summons, craving the certification against them to be rescinded; which takes off the former decreet if it was given upon mistake, (as here it was,) as absolutely as if it had never been *in rerum natura*, and places the party in the same very state and condition he was in before the giving of the said decreet of certification against him, as is expressly provided by the 47th act of Parliament 6, James III. Which leads me in to the next point, that this individual certification is so groundless and null, that this pursuer can found no interest upon it, to acclaim the intermediate maills and duties from the defender, and which will easily appear to any who will be pleased to consider the following grounds against it.

I.—It is an undoubted maxim in law, that *bonæ fidei possessor facit fructus perceptos et consumptos irrevocabiliter suos, nec tenetur ad restitutionem*, l. 15. C. *de Rei Vindicatione*; for he is reputed to possess *bona fide, qui cum opinione et existimatione dominii possidet, animumque dominantis habens et effectum*; which thir defenders not only had but were truly proprietors, had a clear undubitable right preferable to this pursuer, and nowise obnoxious to his inhibition, being long prior; neither is there anything can be condescended upon to put them in *mala fide*, which the lawyers infer *a denunciatione eis facta super jure alterius*. O! but they will say, the decreet of certification obtained against his author's right puts him *in mala fide*. They cannot be heard, 1*mo*, Because no heritable rights can be reduced for not production, except such as the reason of reduction will militate against if produced;

but, *ita est*, their reason of reduction upon the inhibition could not have reached the defender's author's right, because long anterior to the inhibition: *Ergo*, 2*do*, The certification is still null, because the apparent heir of the party inhibited is not called in it, for his interest, as ought to be done. 3*tio*, The said decreet of certification nowise meets the defender's interest; because the writ reduced for not production in that decreet of certification is allenarly a disposition of thir lands, alleged granted by old Forsyth of Dykes to one Ja. Muirhead; whereas, there neither is, nor ever was such a writ *in rerum natura*: and, from the defender's production in the clerk's hands, it will appear, that any right he has is from John Muirhead, and which John derived his right from Forsyth of Dykes younger; so that neither the person granter of the disposition, nor the party receiver, nor the writs called for, do quadrate; and the defender is content certification stand against the disposition mentioned in the decreet of certification; he is not concerned, nor are his rights reduced. 4*to*, No certification could have been granted against the defender's author's right, because, before the date thereof, he was denuded of his right in favours of this defender, and so cannot prejudge him, a singular successor, acquiring it *bona fide*, and not being called. And whereas negligence is alleged, that by the space of twenty-one years no reduction has been intented of that certification; they cannot be heard, because we needed not, it being intrinsically null for the causes foresaid.

II.—He can never object the defender's being *in mora*, because he is *in pari casu* himself, in so far as, through his cessation and supine negligence for the same tract of time, he had never done any diligence, either by action for maills and duties or removing, to clothe his right with possession: and the defender thought himself *in tuto* and in *bona fide* to continue his possession, so long as the pursuer did not stir; yea, till then he knew not of the certification, but so soon as he heard of it he intented reduction, which is seen, returned, and enrolled, and near ready for calling. In respect of all which, the said certification ought to be reduced, and the defenders assoilyied from the pursuer's action for maills and duties, *hoc maxime attento*, that the pursuer being a member of the College of Justice has taken an assignation to this plea.

Upon this debate the Lords FOUND, The decreet of certification did not meet the defender's right, and therefore reduced the said certification, and assoilyied therefrom, *tam pro præterito quam futuro*; so that they had no need to determine the general case, if a certification gives right to the duties aye till it be reduced, for they were not straitened here. As to the question, From what time possessors are obliged to restore the fruits; if from the date of the citation, or litis-contestation, or sentence in a reduction; see the various rules in M'Kenzie's Observations on the Act of Parliament 1621, anent Bankrupts, p. 137.

Advocates' MS. No. 468. *folio* 241.

1676. *February.* The WRIGHTS and MASONS of Edinburgh *against* the BOWARS, SLATERS, COOPERS, &c.

THE wrights and masons of Edinburgh raise a declarator against the bowars, slaters, coopers, painters, glaziers, sieve-wrights, plumbers, and upholsterers,—two

trades against eight,—to hear and see it found and declared, that these eight trades had not the privileges competent to the masons and wrights, nor were capable of the deaconry, &c. As this was negative, so the said eight trades did raise a mutual declarator, assertory of their privileges and capacity; in which, *in January last*, the Lords, after a most contentious debate, in respect of the social acts clearly proven, and past memory of man possessed, found the first five trades had equal privilege with the wrights and masons, were members of their incorporation and not pendicles, and were capable to be elected deacons; but as to the three last, the sieve-wright, plumber, and upholsterer, in regard their assumption was since the decreet-arbitral and recent, so that they had not possession requisite to prescription,* the Lords demurred, and declared they would hear the parties farther, as to their privilege.

For which three trades it was ALLEGED, That whatever grounds had been urged in the former debate in favours of the coopers, bowars, &c. whose capacity the Lords had already declared were as binding, pregnant, and convincing, in behalf of thir three, whose privilege was still under controversy, as the other five; they both have exercised *eosdem actus sociales*. Thir three trades have ever been in use to sit with the wrights and masons in their Mary Chapel corporation; they concurred and voted at the election of their deacon; they are masters and boxmasters to the calling; they are judges to their essays and assises, by a similitude not unlike to the *pares curiæ*, who were *convassalli ejusdem domini* in the feudal law; they have a share in the trust and management of the interests of the corporation, *ubi onus ibi et honos;* in all their acts, seals of causes, assumptions, grants, and other writs, they are denominated by appellatives importing a society, communion, and an equal participation of privileges. But since this neither was nor could be denied by their antagonists, therefore I would come to the disparity assigned, whereby it was alleged, thir three trades were stated in a different and worse case than the other five, in so far as they had been assumed since the date of King James his decreet-arbitral, and the other five trades were incorporated before; and so were in immemorial possession, and might rationally be supposed to be comprehended therein; but after that decreet, which is like the town's *magna carta*, containing the fundamental and unalterable principles of its government, they could do nothing prejudicial thereto, nor assume trades, or communicate privileges or any part of the administration or policy of the burgh to any others save those mentioned and included in the said decreet-arbitral. Notwithstanding of which disparity, I alleged declarator behoved to pass in favour of my clients, unless the wrights and masons could say one of thir two, (none of which they were able to subsume upon:) either that there was a let and impediment resulting from some prohibitory clause in the set or decreet-arbitral, hindering the fourteen trades from assuming new callings into their incorporations, or else that the particular admissions of thir three trades are limited and coarctate *ad speciales effectus*. As to the first, though it were enough to me to say that it is a negative which proves itself aye till they condescend where and how it was prohibited, yet I will deal more liberally with them, since it is easy to demonstrate, that the decreet-arbitral, neither as to its words nor meaning, doth debar the trades from assuming new ones; for, 1*mo*, There is no legislator or judge can be so quicksighted, (though you would allow him Argus his hundred eyes,) when he is statuting or judging, as to have all the future contingencies, all the *casus novi et incogitati*, under his view

* Every community is a fraternity *in qua est dignitatis æqualitas*. Cujacius, *ad Tit. C. Pro Socio.*—*Et fraternitatis nomen nihil aliud est quam æqualitas et communio.* Idem, *ad Tit. C. De Collationibus.*

and consideration, that may afterwards emerge; but the lawyers give advice in such cases, that is, *qui jurisdictioni præest illud ad similia producere interpretatione, vel jurisdictione supplere debet.* *2do,* Though all events cannot be provided for, yet it is manifest, from a reservation in the set, that some such thing has been in their eye; for it is expressly provided, when any good head or overture, tending to the weal of the crafts, shall be proposed by any deacon or tradesman to the council, the same shall be instantly authorised by an act made thereupon; of which kind, the assuming of trades, whereby they are much united and strengthened, is undoubtedly one. *3tio, Ubi eadem remanet ratio, eadem debet esse juris dispositio;* but so it is, whatever reasons persuaded the modelling and reducing the several associations and companies of trades, which were then in being under fourteen deaconries, the same militated still to enforce the necessity and reasonableness of assuming new arts and trades that come in request, or spring up with the genius of the age, and which either were not formerly, or at least not so frequent; and which reasons may be reduced to these three heads,—the 1*st* shall be, The constitution and government of the burgh upon solid and lasting foundations; which in all democracies, whether supreme or subaltern, can be attained by nothing so well as by an equality among the citizens, which is very rationally tempered and adjusted in this decreet-arbitral by a proportion rather geometrical than arithmetical, *habita ratione dignitatis personarum;* for the merchants and trades being the two poles, whereupon the interest of Edinburgh rolled, the great council of the burgh, consisting of thirty-eight persons, was made so to share the town's administration between these two competitors, that the merchants make twenty of the number and the crafts eighteen, whereof fourteen are deacons, the other four are counsellors. At the time of the framing of this there was above twenty-eight trades' incorporations in Edinburgh: all of them behoved to be reduced and moulded into fourteen deaconries. The rest of the trades then in being were not annihilated,—were not turned out of the town; but were brought under such and such deaconries to which they bore the nearest analogy and semblance. *2do,* As the government of the town required that the trades should be reduced to a definite number, that in votes they might not overpower the merchants, so the interest and utility of the trades themselves is extremely concerned therein; for thereby they dilate and extend both their number and power, and hold up their number in case any trade, such as at present the furrier, should decay and fail; and they get no small accession to their common purse thereby. And how thir wrights and masons come so far to deviate from what their predecessors judged to be of so great and important advantage to them, may seem a paradox; for they may remember, during the late animosities and debates, managed with so great heat and zeal, in 1661, between the merchants and trades, one of the main articles of the merchants' grievances against the trades was, that though there were but fourteen deacons mentioned in the set, yet they had engrossed and assumed many other trades under their deaconries, for fortifying and strengthening themselves, and for perpetuating the faction. What has diverted the channel I know not, but *Timeo Danaos et dona ferentes;* and to the present agreement between the merchants, and wrights and masons, against thir other trades, may be properly applied that old politic maxim, *Divide et impera.* *3tio,* As the government of the city, and the advantage of the trades themselves, persuaded them to be listed and ranked under deaconries, so the interest of the subject was not a little concerned therein, viz. that there should be no independent trades, nor vagrant tradesmen allowed to work at random without trial and inspection of some persons of skill and understanding to over-

see their work, that the lieges be not cheated and abused with base and insufficient work. As thir were the reasons that evinced the usefulness of reducing and fixing the trades under particular corporations, so the same militate as pregnantly now; for there can be no more but fourteen deacons still. The interest of the trades is much enlarged by thir assumptions still; the people's security against bad work requires the same still: so that the assuming of new trades can never be imagined to have been prohibited. *4to*, As the words of the set, and reason and meaning thereof, make for me, so also custom, *quæ est optima legum interpres*, stands on this side; for in the incorporation of the hammermen there are eleven trades, such as spurrier, saddler, sword-slipper, &c. all assumed; of which there are four or five taken in since the date of the decreet-arbitral: and yet even some of these lately assumed trades, as particularly the coppersmith, have been actual deacons of the hammermen; which unanswerably proves, there is no difference as to the time of the assumption, whether before or after the set, as is pretended. And whereas the wrights and masons frame an argument from the acts of admission of thir three trades, as if they were limited and qualified *ad speciales effectus*, only to work in their own trades, and not to participate privileges,—it is answered, in so far as their admissions are indefinite, and not exclusive of their capacity, they, in construction of law, must extend to all privileges; *nam favores sunt ampliandi, et indefinitum æquipollet universali.* (*Lege 3. in fine, et 4. D. de Tutelis; L. 43. in princ. et 44. D. de Legatis, 2do, ibique Gothofredus. Dynus, ad Regulas Juris Pontificii*, p. 4. cap. 15 *et* 61, *de Regulis Juris, in 6to, ibique Dynus.*) *2do*, Where it allows them to work in such and such work, which fell not naturally and properly under the subject-matter of their own occupation, the same is so far from being taxative, that it is demonstrative and in their favours, and is an evident ampliation and enlargement of their liberty, beyond what the limits of their calling would have borne them to; *et quod in alicujus gratiam conceditur non est in ejus odium detorquendum.* Now, freedom being that which all men naturally covet, thir pursuers' ambition swells no higher than to be declared freemen, and not slaves; to be capable of the deaconry, not to be deacons: and since, in all their common evidents, they are designed *confratri*, (for *confratres*,) let their animosities be this day buried, and all ordained, by your Lordships' decreet, to live together like brethren in unity.

The Lords declared in favours of thir three trades, that they had equal privileges with the masons and wrights, as well as the other five, who were incorporated and assumed before 1583; at which time the decreet-arbitral was made.—See, between the pewtherers and plumbers in another place, February, 1679.

Advocates' MS. No. 469, *folio* 242.

1676. *February.* ANENT INITIALIA TESTIMONIORUM.

I HAVE heard some hudibrass the *initialia testimoniorum*, viz. the examining of witnesses upon their age, their being married or not, &c. as an impertinent and insignificant old style; notwithstanding that the same is necessary to be interrogated and inserted; for, *1mo*, If the witness be found lying and trinketing in thir, it vilifies and derogates much from the weight and faith of his testimony: but many doctors think that *falsum* committed by a witness *in extrinsecis, non facit testimonium cor-*

ruere in totum.—See M'Keinzie's Pleadings, p. 82. *2do*, By this it is known if the witness be past fourteen or eighteen; before which time a witness is not supposed to know the hazard of an oath, or to depone with judgment. The *3d* reason is, to distinguish them from other men bearing the same name or designation. *4to*, If they be deponing *in re antiqua*, the telling their age invalidates or adminiculates their testimony; as they were then of years capable to discern or consider such things, which must always be things falling under one of the five senses.—See my abridgment of Farinacius' tractate *De Testibus*.

In Saxony, Vesembec tells us, they go a greater length, and interrogate the witness anent his wealth and riches; for, if he be poor, he is suspected as more liable to be tempted: yet *vide parag. ult. Instit. de Suspectis Tutoribus.* This is coincident with our vulgar objection against witnesses, viz. that he is not worth the King's unlaw, estimated to L.10 Scots. But we set it at so low a rate, that it renders the declinator altogether unpracticable; for there is scarce any witness brought in but he is clear to affirm he is worth that: his clothes, if rouped, would be of that value. It should be fixed at L.100 Scots, or something like that. Since all that is acquired by money has grown, the price of that should augment also; especially in this age, wherein the faith of witnesses was never more lubric and vacillant, nor ever so much perjury discovered: so that it is a most commendable part in our law to leave as little to the credit and probation of witnesses as can be; for it allows them not in a case above L.100 Scots; and really this way of probation cannot be restricted enough, considering the impudence this generation has arrived at.

Advocates' MS. No. 471, § 1, *folio* 243.

Anent the Viscount of Oxenfuird's Case.

The Lords found long ago, in the Viscount of Oxenfuird's case, *anno* 1664, that money lying beside him at his death, because of the destination of it, *per voluntatem patrisfamilias et domini*, to be the price of land which he had bought on his death-bed to evict his lady's terce, (he had more need to have been thinking on another thing,) was heritable, and no third due furth thereof to the relict, and the other two parts of the executors, but that all fell to the heir. See, in my Compend of the Decreets.

Advocates' MS. No. 471, § 2, *folio* 243.

Viscountess of Oxenfuird *against* her Son.

Where a mother aliments her children, it falls to be controverted *utrum impensas istas animo repetendi fecit, an animo donandi, ex pietate datas fuisse præsumendum est.* Bernardus Schotanus, *in examine juridico*, p. 124, answers, with five distinctions; 1mo, *Vel est protestata se nolle eos impensas donare, vel non est protestata.* 2do, *Vel super iis impensis rationes confecit, vel non.* 3tio, *Vel bona liberorum administravit, sicque eorum pecunias reditusque possederat, vel non.* (See

3d January, 1679, Daes and Lindsay.) 4to, *Mater vel est locuples, vel pauper.* 5to, *Impensæ factæ vel sunt magnæ, vel tantum parvi momenti.* To which I add, 6to, *Liberi vel sunt infantes, vel infantiæ proximi,* with whom she could make no paction; *vel sunt puberes, seu pubertati proximi.* 7mo, The children either had means of their own *aliunde,* whereupon they might be sustained, or not.—See Guthrie and M'Karstan's case in 1672, No. 314, *supra.*

Advocates' MS. No. 471, § 3, *folio* 243.

Anent Comprising.

I have heard it affirmed, that a man may now comprise upon a bond without giving a preceding charge of horning; upon this reason, that an execution of poinding and denunciation is a more solemn intimation to the debtor, and bears also a search for moveables, than a single charge; but the bond must be registrate. However, I think it *humanior sententia* to give him time by a charge, conform to the noble method prescribed in *L.* 15. *D. de Re Judicata.* In the Roman law, they had *inducias quadrimenstruas ad solvendum judicatum.*

Advocates' MS. No. 471, § 4, *folio* 244.

Anent Lords of Session.

I have heard of an act of sederunt, at least a consuetude, where a Lord of the Session retires upon a demission; because of the character he once bore, he takes place of all that are admitted afterwards on the Session, though they be actually Senators, and he not. This holds where his *missio* is *honesta vel causaria,* but not if it be *ignominiosa.*—See *Tuldeni Jurisprudentia Extemporalis,* p. 249. See Papon's Arrests, p. 363.; *Codex Fabrianus,* lib. 1. tit. 2. defin. 13. p. 31.; Hope's Collection, tit. Of the Session, fol. 131.; where another place of Faber is cited, viz. lib. 3. tit. 17. *ubi Senatores vel clarissimi.* See *Hippolitus de Marsiliis singul.* 107. See my Observes on the act of Apparel, 1672. *Vide Ægidii Menagii Juris Civilis Amœnitates,* cap. 28.

Advocates' MS. No. 471, § 5, *folio* 244.

Anent Disposition to a Son *in familia.*

Lands disponed to a son *in familia,* or minor, *præsumitur* to be bought and acquired with the father's means, especially if the son be minor; and so the father's creditors may effect the land bought, by a declarator; whereof see the form set down by M'Keinzie, in his Observations on the act of Parliament, 1621, against Bankrupts, p. 174. Hence Antonius Faber, in his famed Codex, p. 413, says, *Pecunia*

præsumitur semper ementis, nisi sit filius in familia; and so found the Lords in Posso's case, in February, 1668. See this in some cursory Observes out of Faber's Codex, *alibi.* But *dubitatur,* if the money wherewith the land is bought be the price of lands lying in another kingdom and sold, and brought from that place, *ex. gr.* from England, where, if it had continued, they could not have reached it.

Advocates' MS. No. 471, § 6, *folio* 244.

ANENT THE MARRIAGE OF APPARENT HEIRS, IN WARDHOLDINGS.

THE Lords found, in the case of my Lord Colvill, in February, 1667, that an apparent heir's precipitation of his marriage when his predecessor is upon deathbed, to frustrate the Exchequer, or other superior of ward-lands, of the benefit of their marriage, is unwarrantable; and therefore found them liable in the casualty, as if they had been married after; as may be seen at the forecited place, where they went upon Balfour's authority. (Skeen, in his learned notes on *Quoniam Attachiamenta,* cap. 91. in Latin, tells sundry decisions of the same.) Yet it may be argued, that an apparent heir should be permitted to marry *in articulo mortis* of his predecessor, as well as the law allows a man to marry his concubine *in articulo mortis, ad effectum legitimandi bastardos ex ea genitos,* whereof Craig gives an instance in the Lord Semple, p. 230; for both equally prejudges the fisk. Yet there seems to be some disparity; for the marriage of the apparent heir, (if it had not been precipitated,) were a certain and uncontroverted casualty befalling to the superior. That of bastardry is not so: because the bastard may dispone, in *liege poustie,* his means to whom he will; and if he have lawful children, they succeed to him without any right *ab intestato;* and so nothing would fall due to the King, or lord of regality, if it be within one; and they have right to bastardies and last heirs, which is doubted. 2*do,* Marriage is most favourable, and therefore allowed at any time; and yet its principal end, which is *procreatio prolis,* cannot then be obtained; *et cessante causa, cessare debet effectum;* and this reason is common to both cases, only in the last there is the favour of legitimation superadded. *Vide supra,* July, 1671, No. 235.

If an heir of ward lands be infeft in his father's lifetime, his marriage is not due to the superior; and if he has got one marriage, he will not get the second when he falls a widower. *Alias* in an heiress of ward-lands.—See Skeen and Stairs on the Casualty of Marriage.

Advocates' MS. No. 471, § 7, *folio* 244.

1676. *February.* SIR WALTER SETON of Abercorne *against* the EARL of WINTON.

SIR WALTER SETON of Abercorne having been the Earl of Winton's tacksman for three years, as to his casual rent of coal and salt in East Lothian, for which he was to pay him 24,000 merks of tack-duty; and when they came to count and reckon, he gave up exorbitant debursements waired out upon the putting down of

sinks, levels, and other works, which, though they were not contained in the tack, nor provided for, yet as *utilis negotiorum gestor* he craved repetition, or retention of so much, in so far as he had bettered my lord's condition by these works.

It was CONTENDED, That *qui aliquid facere obligatur*, (without specifying on whose charge and expence it shall be done,) *id suis sumptibus facere debet;* so Zoesius *in prælectionibus feudalibus, pagina* 113, and cites *Julius Clarus* for it. *Quod quis spopondit id suo impendio dare debet*, says, *L.* 20, *D. de Operis Libertorum, et Lex* 53, *D. de Fidei-commissariis Libertatibus.* A seller makes a right on his own charge, to the buyer, unless the contrary be specially provided by a paction. *2do*, All ambiguous and dubious clauses in writs and contracts are always, in construction of law, interpreted *contra eum* who is thereby obliged, *L.* 39, *D. de Pactis; L.* 21 *et* 33, *D. de Contrahenda Emptione; ibique Autumnus, in Censura Gallica:* who is censured again by Scotanus, *in Examine Juridica, pagina* 3: of which the law gives this reason, *quia potuit ille apertius contractui legem dicere, et sibi imputet* that he did it not. But, *3tio*, We are not straitened to recur here to these general principles of law, since the meaning and design of parties which governs all writs may be elicited from other particulars in this tack; as, by that clause, whereby if any new sinks or levels be made, Sir Walter is obliged to pay two bolls for every acre of ground he so breaks; if he was to pay for the ground and not my lord, much less was the expence of these levels to fall upon my lord. As to his partial payments or furnishings to my lord's house, he must say, they were chamberlains, cash-keepers, &c. in the words of the tack, obliging him to pay to my lord, his chamberlains, &c. the tack-duty, and shew their receipts, *alias* he was *in mala fide* to pay to any others. Next, my lord must have compensation, in so far as he has waired upon the pans beiting, since Sir Walter is, by a clause of the tack, bound to leave them in as good condition as they were in when he found them; which would have required a visitation by tradesmen, both at the entry and ish, ere one can institute a parallel of the deterioration. Yet this is a great *vidimus* that they were insufficient at his overgiving of the tack, because a good beit, in the opinion of persons of skill, will last for a year; and it is offered to be proven, my Lord Winton's commissioners were put to beit some of them within six months after they were cast in their hands; and that they were sufficient at his entry, must be presumed, for he would have seen to that. And if his extravagant defalcations were allowed then, it were an easy way for every tacksman to pay his duty by exhausting, absorbing, and compensing it with charges waired on the work. Sure my Lord Winton meant otherwise; and so did all other parties, since he has got the same tack-duty paid him by tacksmen who succeeded to Sir Walter, and yet they carried up all these levels on their own expences, whereof Sir Walter now craves allowance. And what sober, indifferent man will imagine that Sir Walter was to have all that done to his hand, or that my Lord Winton designed to compliment him with so great an ease? *Nemo præsumitur suum temere jactare.*

Advocates' MS. No. 472, *folio* 244.

1676. *February.* LORD ROSSE of Auchlossan, and the DUKE of MONMOUTH or BUCCLEUCH, *against* the EARL of TWEDDALE.

BESIDES thir decisions marked, there was in this Winter Session two famous actions.

One, a declarator at my Lord Rosse's instance, as donatar to Captain Rosse's *ultimus hæres*, in which Rosse of Auchlossan compeared, and offered to prove his contingency of blood to the said umquhile captain; and probation being led, a very pretty debate arose from the civil law, if *fama* of the country and designations *per dulcissimam appellationem* of a cousin, either in discourse or in writs, were probative of consanguinity; wherein the advocate compared Rosse's fortune to Nilus' head; we see the streams, but know not the fountain.

The other was by the Duke of Monmouth or Buccleuch against the Earl of Tweddale, as executor to the last Countess of Buccleuch, for relieving the heir of debts, and reducing a transaction between them, because done in the duchess her minority, to her lesion; and consisting of many other points. *Vide infra*, No. 545, (thir same parties, February 14, 1677.)

Advocates' MS. folio 244, margin.

To shut up this Winter Session 1675, and January and February 1676 with a remark should have been set down in the beginning of it, because it happened then, viz. Captain Martin's escape furth of the tolbooth of Edinburgh, where he was imprisoned by command of the Lords of Session, till the event of a plea depending against him, upwards of L.5000 Sterling value of goods he had, in a manner by piracy, taken out of a ship he pretended to be a lawful prize. One night he made his escape in women's apparel, and Patrick Vans, the keeper of the tolbooth, upon a petition given in to the Lords of Session, got himself assoilyied of all negligence upon his part, that so the subsidiary action might not recur against him, after the debt for which he was imprisoned were constituted against him; which would have been very difficult, he being escaped, and they having had many things which required clearing by his oath; which absolvitor proceeded also on this second ground of law, that his escape was merely *casus fortuitus, qui nulla humana prudentia prævideri poterat*, and so could not be attributed to omission in point of duty; and yet it was cried out upon, as most unjust, both as to matter and form, and that it would not hinder but he might be convened by the creditors for Martin's debt, they not being heard, and so *res inter alias acta* could not prejudge them. *Vide supra, November*, 1672, No. 374.

Advocates' MS. No. 473, folio 244.

1676. *June.* PATRICK WISEHEART *against* the COMMISSARIES of EDINBURGH.

PATRICK WISEHEART, as son and executor confirmed to George, late Bishop of Edinburgh, pursues the Commissaries of Edinburgh, and their collector, for payment of the quot of the testaments of all persons who deceased within the diocess of Edinburgh before the death of his father; they suspend on double-poinding, against him and Mr Alexander Young, present Bishop of Edinburgh, who acclaimed them as truly belonging to him, in regard they were not confirmed till his entry to the said office, and so the consummation, and not the inchoation of the act, must be considered. In this competition, the Lords FOUND these quots fell under the last Bishop's anne, and so prefer'd Mr Wiseheart therein.—In which the present Bishop had small loss, since at his decease the like will befall to his executors, as a part of his anne. See for annates, my observes on the act of Parliament in 1672.

This decision differs from the arrest of the Parliament of Savoy in a parallel case, observed by Gothofredus, a Bavo, *in praxi sua criminali, pag.* 86 *et* 87: A lord of a manor farms his lands, together with the jurisdiction of holding courts and reaping the emolument and obventions thereof; one commits a delict, and is processed for it; during the dependance, the tenant's right expires, and the land is of new farmed to another; he resumes the dittay, judges, condemns, and amerciates. *Quæritur*, To whom the mulct belongs, whether to him in whose time of his right the crime was perpetrated, or to him who pronounced sentence? That senate determined in favours of the second.

Advocates' MS. No. 477. *folio* 246.

1673 and 1676. *July.* ANDREW CRAWFURD *against* JANET SAVAGE.

1673. *July.* IN the double-poinding pursued by the tenants of Bathgate against Andrew Crawfurd in Lithgow, on the one part, and Janet Savage on the other;

ALLEGED for Savage,—She must be preferred to Crawfurd, whose title was as donatar to the liferent escheat of Hamilton of Bathgate; because she stood infeft in annualrent furth of these lands, not only prior to his gift, but to the completing of the rebellion, by out-running of year and day, whereupon his gift proceeded.

ANSWERED,—He must be preferred, notwithstanding her infeftment is before year and day was run, and his gift; because the same is posterior to the denunciation, by which *regi fuit jus quæsitum*, and which is the true ground of his gift.

REPLIED,—Though her infeftment be posterior, yet the heritable bond containing a precept of seasine, and whereon the same was taken within four days after the denunciation, being prior to the said denunciation, it is sufficient to sustain the said infeftment of annualrent; which must be drawn back *ad suam causam, videlicet* the bond. And though the rebel cannot, indeed, while the rebellion is *in cursu*, make any voluntary rights, whereby to prejudge the fisk, or his superior, of their casualty of the escheat and liferent, yet it were against all sense to extend and stretch this so far as to think a supervenient denunciation could hinder a third party, not con-

cerned, or ignorant, to perfect and complete a right legally granted and constituted to him, *ab initio*, and before he became rebel.

DUPLIED,—As he could make no valid right after his denunciation in prejudice of his superior, so the middle impediment and superveniency of the rebellion hinders the two extremes to be conjoined. Likeas, a precept of seasine, being a mandate, it requires a hability in the granter at two times, both when he gives it and when the same is put to execution; but here the party granter was not *habilis persona* the time of taking the said seasine, because rendered incapable by the horning executed against him; and therefore this seasine must be null, in respect of the superior and his donatar.

TRIPLIED,—That of hability is a mere sophism, holding only in revocable mandates. *2do*, A horning ought to be of no more force than an inhibition; but if an inhibition had intervened between the granting of the bond bearing a precept and the taking of seasine thereon, the same could never reach that right: so neither ought a horning, unless it were before the bond and right which is the ground of the seasine.

Upon this debate, having got the Lords' answer, they preferred the annualrenter to the donatar, because his seasine, though posterior to the denunciation, yet depended on a specific obligement and destination and cause antecedent to the same.

Then they began to allege upon a decreet, wherein Robert Milne, mason, being donatar to this same escheat on this same horning, was preferred, not only, after debate, to this Savage, who now competes, but also to one Clerkson, whose right is incontrovertibly preferable to Savage's; and so by the rule, *Si vinco vincentem te, tunc te vinco*, he must yet be preferred, because the said first donatar being satisfied by his intromission, he was now come in his place as second donatar, and behoved to have his right. *Vide l.* 14, *D. de Diversis et Tempo. Prescriptionibus.*

To which it was answered, that this point was not then debated, nor the grounds now insisted on then represented to the Lords to move them; that their present decision is opponed as much more just and consonant to the principles of law and their own daily practique; that if they found ought contrary there, they have recalled and altered it here, upon very solid and rational grounds; and that in the competition for multiplepoinding pursued by Hugh Sinclair's tenants of Inglismachan and Blackburne against his creditors, apprisers, on the one hand, and the Earl of Annandale, donatar to his escheat and liferent, on the other, the Lords have this very same Session preferred the apprisers to the donatar, though both their apprisings and infeftments were after the denunciation, but within the year only, because there was no deed of the vassal here prejudging his superior after the rebellion, but the said diligences were led on bonds prior to the denunciation; yea, some of the apprisers were preferred, though not infeft within the year, because they had given in their signatures to the Exchequer before the year, and were there delayed, and so *per eos non stetit;* and yet this decision, though most just too, is not so favourable by far as ours. See the creditors their information against Annandale beside me.

The practique observed by Dury at the 16th February, 1631, Cranston and Scot, would be marked, and which Balmanno hath also, *verbo* Declarators, as also the places there cited.

This decision seems very inconsistent with the *ratio dubitandi* we have noticed in the question set down *supra*, at No. 279, viz. whether or no a base infeftment, though clad with possession before the denunciation of the granter, could sustain against the superior and his donatar to the escheat of the granter; for if the superior was not

bound to acknowledge such a right because unconfirmed, then much less this, which had not only the defect and want of confirmation, but also seasine taken after denunciation, and no possession attained before the annual rebellion was elapsed. But the Lords at last found such a base infeftment preferable.*

See the informations of that case beside me, where the case of Milne and Clerkson is cited.

They urged always, I might add to my allegeance, that the said right was clad with possession before year and day was outrun to make it relevant; but I contended I was not bound to that, but that my allegeance as it stood simply conceived, was most relevant, *videlicet*, that she was infeft within the year upon a bond granted before the denunciation. And Dury has a practique of it at the 23d of January, 1627, between Wallace and Porteous, where this may clearly be found by consequence; for there though a rebel may not dispone *currente rebellione*, not even to satisfy a personal debt prior to the horning, yet he may, if it be for implement of a specific obligement to dispone and infeft prior to the horning, which is the very case in hand.—[See the Case below.]

Advocates' MS. No. 413, *folio* 223.

1676. *June.* COCHRANE of Babachlaw *against* JANET SAVAGE.
[See the Case above.]

IN the action mentioned, *supra*, at No. 413, in July, 1673, between the tenants of Bathgate, Janet Savage and Andrew Crawfurd, donatar to the laird of Bathgate's escheat and liferent, the Lords there found Savage her base infeftment (though taken posterior to the denunciation of the horning,) preferable to the gift of escheat; both because it was within four days after the denunciation, and so far within year and day, as also because it depended upon a precept of seasine contained in an heritable bond long prior to the charge of horning. (*Vide infra*, November, 1676, Mr William Weir, No. 509.) Of this decreet, Cochrane of Babachlaw, assignee by Crawfurd the donatar, raises reduction and suspension, upon this reason, that the decreet was wrongously and surreptitiously extracted, against a stop by deliverance upon a bill referring the matter of new to my Lord Strathuird, who heard the clause formerly; the bill craved a farther hearing upon that ground, set down *ubi supra*, that the donatar by a decreet *in foro contentioso, in anno* 1667, was already preferred to this annualrenter, and to one Clerkson, who was in a stronger case than this Savage, in so far as he was infeft base before the denunciation, *et si vinco vincentem te, tunc te vinco.* See M'Keinzie's Observations on the act 1621, p. 165. Now this allegeance was proponed, discussed, and repelled in Savage her decreet of preference, in 1673, only it made no mention of the bill and stop and second reference. Craigie, before whom the case fell, was much scandalized; his titubancy was, how to reconcile two of the Lords their decreets *in foro in terminis*

* But suspension and reduction being raised of this decreet, the Lords, *in June*, 1676, preferred the donatar, albeit seasine had been taken before denunciation, as it was not, unless it had been confirmed and acknowledged by the superior, or made public by possession, not civil, but natural or legal. See more in June, 1676, *numero* 479

interfering and clashing, one of them behoved to be unjust, and so condemn his Majesty's letter of protection to the Lords, in May, 1674, discharging the quarrelling of any of the sentences of the Session upon iniquity. He takes it to the Lords' answer, which of the two contrary decreets they would acknowledge and legitimate. They adhere to the first decreet, and prefer the donatar of the liferent escheat not only to Savage, (who was infeft in an annualrent after denunciation, but the heritable bond was prior,) but even to Clerkson, or any who were basely infeft before the denunciation. The reason of which decision lies in this,—that it were unreasonable to defraud and exclude the King, or respective superiors, of the liferent and escheat of their vassals, falling and incurred through their contumacy, and lying year and day unrelaxed at the horn; the creditors might have relaxed him within the year, and that had saved them, by private clandestine deeds, which they, as superiors, had never owned nor acknowledged, by adhibiting their consent, either in accepting a resignation, or granting a charter of confirmation; without which deeds and consent of his own, the *jus quæsitum* to him by the rebellion could not be stopped. And yet thir casualties of superiority, being odious and unfavourable in law, are not to be extended beyond their due limits, and lawful and honest creditors are not to be wronged thereby; only they should know the condition and capacity of him with whom they contract: l. 19. D. *de Regulis Juris*. *Vide supra, numerum* 446, [Earl of Aboyne, 28th February, 1674;] *item, numerum* 445, anent quarrelling sentences of the Lords as unjust, in Almond and Dumfermling's case. *Item, numeros* 122, [Earl of Argile *against* Cambell, 2d February, 1671,] and 156, [Hamilton *against* Bell, 25th February, 1671.] And upon thir grounds the Lords found the donatar preferable; unless we would either say, the superior had consented, acknowledged, and confirmed Savage's infeftment before the gift, or that we had made it public by possession any time before the expiring of year and day. And when I offered to prove possession of that term's annualrent preceding the elapsing of year and day, Craigie forced us to allege, it was either legal possession, by obtaining a decreet of poinding of the ground against the tenants within the year; or by natural possession, receiving it from the tenants, labourers of the ground, before the year expired: and that it was not sufficient to say, made public by civil possession, of receiving the annualrent from the heritor, since that respected not *jus fundi*, and such payment might be ascribed to the personal obligation. *Vide supra, numero* 297, [16th January, 1672;] *item*, the case of Hew Sinclar's Creditors, at the foresaid 413th Number.

On the 8th of June, 1677, the Lords having advised the probation led by witnesses and discharges, to prove the possession within the year *currente rebellione*, they found the same not proven; and so preferred the donatar to Savage, the annualrenter: only, since the maills and duties were not proven against the tenants, they could not decern against them till they were proven.

Advocates' MS. No. 479, *folio* 247.

1676. *June.* ROBERT MACMORRAN *against* THOMAS ROBERTSONE.

ROBERT MACMORRAN, as assignee constituted by Mungo Wood, college-treasurer of Edinburgh, who, *eo nomine*, was confirmed executor *qua* creditor to Isobel

Barron, first relict of Nicol Udwart, and then of Mr Robert Balcanquall, (and which Isobel was infeft by the said Nicol, in 1624, in the liferent of that tenement and dwelling-house, now acquired and possessed by Thomas Robertson, brewer,) pursues the said Thomas for the maills and duties thereof, by the space of four or five years before she died, which was in anno 1667; her last husband, Balcanquall, (to whom the same belonged *jure mariti*, and who had disponed it to Thomas his authors,) having deceased in 1662, and so her own right reconvalesced.

1*mo*, ALLEGED for the defender,—It was prescribed.

ANSWERED,—Though forty years was run, yet, *contra non valentem agere nulla currit præscriptio;* she was clothed much of that time with a husband. This was sustained to interrupt.—*Vide supra*, the case of Mason and Rind, [January, 1672,] *numero* 333.

2*do*, ALLEGED,—He was seven years in possession, by virtue of a real right and infeftment, before the intenting of the pursuit, and so had the benefit of a possessory judgment, and behoved *lucrari fructus perceptos.*

ANSWERED,—That he could not acclaim the benefit of a possessory judgment, unless he could say seven years in possession, by virtue of a right, since Balcanquall, the liferentrix, her last husband's death, in whose lifetime she could not pursue or interrupt; likeas the defender's possession was her possession.

REPLIED,—That the seven years for giving a possessory judgment must be accounted within these years in which she was married; as well as the Lords did, in ; 1668, between the Earl of Winton and Coventon, find, that minority did not hinder the seven years for making up the possessory judgment to run; although *minor non tenetur placitare*, and is equiparat to a wife under the power of the husband. Craigie inclined to repel this, unless we would allege seven years in possession since she became *sui juris et valens agere* by her last husband's decease.—See Stair's System, tit. 12, Of Real Rights, No. 23. *pag. mihi* 180; *infra*, 30th July, 1677, No. 631, Lindsay *against* Frazer.—Then we urged, that after the death of her first husband she was three years a widow *sui juris*, and all that time was silent, and the defender's authors possessed; and, since the decease of her second husband, she was silent other three or four years: which two times and taciturnity being conjoined together, made up seven years' peaceable possession before her warning and action for maills and duties; and so behoved to put the defender in the case of a possessory judgment, that he was not liable to dispute his right but in a reduction. This subtilty seemed plausible to Craigie. *Vide* parag. 12 et 13, *Institutionum de Usucapionibus, ibique interpretes.*

But, 3*tio*, we ALLEGED, Absolvitor; because we offered to prove paid for the years acclaimed, except one; in so far as the liferentrix had granted a discharge to Margaret Balcanquall, daughter and heir to Mr Robert, her husband, and so liable to the defender to warrant her father's disposition to his authors, acknowledging her receipt of the maills and duties of her liferent lands in Edinburgh, which the said Margaret Balcanquall had intromitted with. Now the liferentrix being paid by her, she nor her executors can never recur; and if the said Margaret Balcanquall should lay claim to them, she is repellable in law, because she is the person liable in warrandice to the defender, *et quem de evictione tenet actio eundem agentem repellit exceptio.*

ANSWERED,—1*mo*, It behoved to be a specific discharge of the individual maills and duties now acclaimed, and of the same years, and for the same house. 2*do*, Offered to prove she liferented other tenements in Edinburgh; and so it may be a

discharge to the said Margaret of her intromissions with these. *3tio*, Offered to prove, by Thomas Robertsone's own oath, that he never paid or counted to the said Margaret, to Isobel, the liferentrix, or any other, for the maills and duties now acclaimed.

REPLIED to the first,—A general discharge was as valid and effectual to extinguish and take away a debt as a specific one. To the second, They behoved relevantly to say, that she liferented two different tenements beside this controverted; for if she liferented this and another, the discharge will extend to both, mentioning an acquittance of intromission with her liferent tenements *in plurali*. Find the third relevant, of consent.

This cause ended in an agreement; and Thomas Robertsone paid 600 merks for a discharge of it.

Advocates' MS. No. 483, folio 249.

1673 and 1676. SIR ANDREW RAMSAY, LORD ABBOTSHALL, *against* FRANCIS KINLOCH.

1673. *June.* SIR ANDREW RAMSAY, Lord Abbotshall, as standing infeft in the barony of Waughton, pursues a reduction and improbation against F. Kinloch, of his right of the lands of Gilmerton. Wherein the terms being run, and the pursuer craving certification, *contra non producta;*

ALLEGED,—The same could not be granted, because he had produced sufficiently, in so far as he had produced a disposition and infeftment granted to Mr J. Cockburne of these lands prior to the pursuer's interest, either of comprisings or inhibitions. *2do*, He had also produced a public infeftment of the same, flowing on Waughton's resignation prior to any real right of comprising; and so needed produce no more, having produced a better and a more ancient right than the pursuer's title, and which excluded him. *Vide* Dury, *26th February*, 1622, *Earl of Kinghorne* against *Inchture.*

REPLIED,—The pursuer must have certification, notwithstanding of what is produced. *1mo*, Because Cockburne's infeftment is but base. *2do*, It is but under reversion, and so can never stop the superior, and he who hath right to redeem, from having certification against all other latent rights of these lands; all that is produced being allenarly a base right, though prior, and not a perpetual, but only a temporary exclusion of the pursuer's interest, who is stated both in the right of suspension and reversion; and so can never stop certification sought at his instance. And as for the public infeftment, and which is both prior and irredeemable, no respect can be had thereto, because, *1mo*, The instrument of resignation whereon it proceeds is not produced, though, by act of Parliament, necessary to be produced, and without which be seen we conclude in law no public infeftment ever was, but the same must fall in consequence. *2do*, The said infeftment is posterior to Smeiton's inhibition, which is a part of the pursuer's interest, and therefore can never defend against the certification.

DUPLIED,—The right, though base and affected with a reversion, is sufficient to defend the property, and stop certification against any other rights, aye and while it be redeemed. As for the want of the instrument of resignation, it is not material:

they'll make up the tenor of it by adminicles. And as to the pretence that the inhibition is before the public right produced, it is answered, the same is good enough to afford a certification against the said public infeftment in the reduction; but it was *inauditum*, and a ranversing of all the principles of law, to imagine that a personal right, such as an inhibition, or any right whatsoever, except a real right of infeftment in lands, could ever be a ground to infer certification in an improbation *contra* real rights, in which case the only title must be a real right. See Dury, *3d March*, 1626, *Law* against *Lady Balgony;* and Craigie's consequence from that decision, in his Collections, *verbo Inhibitions.* And though there was a comprising and a public infeftment taken thereon following upon the ground of the said inhibition, yet none ever dreamed of such an absurdity, as that these two could be conjoined to produce certification in an improbation, where a public and irredeemable infeftment intervened, *tanquam medium impedimentum*, between the inhibition and the infeftment on the comprising; and a retrotraction of the real right to the inhibition and fiction, supposing them both of one date, is a notion that surely no lawyer can be guilty of. See the Triply made to this in the informations beside me. *Vide infra*, No. 508, § 10, November, 1676.

At the advising, the Lords fell mightily divided. The Advocate adhered *mordicus* to form, that nothing but a real right was the ground whereon a certification in an improbation could be sought; whereon the Lords, unwilling to determine it downright, but to intimate their inclinations that the same were to have it waved, declared they would hear the advocates upon that point *in presentia.* It is most certain, if there had been nothing else standing in the way save only Cockburne's base and redeemable infeftment, the same would have been repelled, as not sufficient to stop the certification *contra non producta*, though anterior to the pursuer's interest produced. *Vide* 10th December, 1680, Earl of Home. But the thing that stuck with the Lords, and which they could not win over, was the public and irredeemable infeftment produced, which was prior to any real right in the pursuer or his author's person; and though the inhibition was before it, yet that can give no interest in law whereupon to crave certification in improbations. For, laying that aside, I saw a little time thereafter certification granted to the pursuer of an improbation, notwithstanding there was an infeftment prior to the pursuer's produced, only because the same was base and redeemable, and the pursuer had the right both of the superiority and the reversion. And Sir George Lockhart affirmed the certification could never have been stopped in law by Cockburne's right; but that it was beyond all measure hard and unequal to think to carry a certification where the pursuer's real interest was so fully debarred and excluded by that public prior infeftment, and that no justice could make an inhibition to produce such a certification.

The Advocate, having heard us, if Sir George Lockhart had been clear that certification should pass notwithstanding of the said public infeftment, in a great passion affirmed, that Sir George abused the lieges, and made them believe that was law, which, in his own conscience and knowledge, he was persuaded to be just contrary. But he was in the wrong to him, for he was of the same opinion with the Advocate.

Vide infra, February, 1674, *Dumfermeling and Calander*, No. 445.

Then, upon a bill given in by the pursuer, the Lords having declared they would instantly hear the reasons of reduction in their own presence at the calling, the de-

fenders proponed, upon the ninth and eleventh articles of the regulations, that they were not bound to answer till the same came in its ordinary course of the roll; which, after removing of parties, being considered and advised by the Lords, they, over the belly of the regulations, ordained them instantly to answer *in causa*. Which gave people occasion to say that the Lords should be sworn to the keeping of them as well as others. But there was an evasion, and the case met not that of the regulations.

They are bound to keep the regulations without swearing, because they are ratified by act of Parliament.

Advocates' MS. No. 400, folio 218.

1676. *July* 27. Sir Andrew Ramsay of Abbotshall *contra* Francis Kinloch. (See this cause mentioned, *supra*, in June, 1673, No. 400.) It is a reduction-improbation, and declarator of Francis his right to the lands of Gilmerton, wherein the case was deduced to the Lords in the Inner-house, thus:—

The deceased Jo. Hepburne of Waughton being forced by the necessity of his affairs, and the common iniquity of the times, *in anno* 1652, to wadset his lands of Gilmerton (which were a proper part and pertinent of the barony of Waughton,) to Mr John Cockburne, advocate; the manner of the surety and conveyance they agreed upon was, that Waughton should grant him an heritable and irredeemable right, and Mr Jo. should, by his back-bond and formal letter of reversion apart, declare there was no more intended but a wadset, redeemable upon the payment of L.15,000 Scots to him, his heirs or assignees, and of the expences he should ware and employ upon building, providing always the same did not exceed the sum of 1000 merks Scots. Waughton being one who trusted more to other men's management than his own, and Mr John being an exact man and an able lawyer, and punctual to have everything performed to him, it was no wonder that Waughton and he differed, and that Waughton, at any rate, desired to be rid of his neighbourhood.

F. Kinloch is persuaded, by one Henry Kinloch, a cousin of his own, and a domestic servant of Waughton's, to enter upon that game; Waughton and he strike hand, join issue, and agree that Francis shall pay Mr John Cockburne his money, and take Mr Cockburne's wadset right he had on these lands; whereupon Mr Jo. Cockburne is required to take his money, to which, after some difficulty, he condescends; so then Francis obtains an heritable and irredeemable right and disposition to the lands of Gilmerton from Mr John Cockburne and his wife, with consent of the Laird of Waughton; and for salving and securing all their interest, (just as Mr Jo. Cockburne's bargain and surety was,) he gives a back-bond or declaration of the same date with the disposition to him, and so is *pars contractus*, and more than *pactum incontinenti adjectum contractui bonæ fidei;* by which he confesses, albeit Mr John Cockburne had disponed these lands irredeemably to him, yet the truth was, Mr. Jo. had granted a reversion of them upon the payment or consignation of the foresaid sum of L.15,000 Scots; and therefore, lest that deed should be a contravention or commission of the warrandice given him by Mr Jo. from fact and deed, he excepted the said reversion from the warrandice, and then adds, Likeas he accepted of his own right and disposition with the burden of the said reversion: and which last words and clause was undoubtedly taken and intended for the security of Waughton, and for preserving and holding

up the reversion, which otherwise would have been extinguished by Waughton's consenting to Mr Jo. Cockburne's absolute disposition.

This being the state of F. Kinloch's right to the lands of Gilmerton, Sir A. Ramsay, having matched his son with the heiress of Waughton, and having, both with great pains and considerable sums of money, near adequate to the worth of the lands, acquired the haill apprisings and other real rights affecting that estate,—did first essay all soft and moderate courses of settlement with Francis: but these amicable overtures proving ineffectual, and being slighted, he was, much against his inclinations, forced to the *ratio ultima rerum*, to intent this reduction, improbation, and declarator against this defender; wherein the terms being all run, the production satisfied, and certification granted *contra non producta*, your Lordships are now to hear the reasons, and which are plain and short, and in sum resolves in this,—that Abbotshall and his son crave from your Lordships' justice that Francis Kinloch's right to the lands of Gilmerton may be declared to be qualified, affected, and burdened with Mr John Cockburne's reversion, as bottomed on the same foundation, as accepted upon the same conditions by his back-bond foresaid; and, consequently, it is redeemable by the pursuer, as having the undoubted right of reversion, upon the payment or consignation of L.15,000 Scots, and of 1000 merks for building. And really, when the Dean of Guild gets that, I hope neither he nor any other sober considering person will think he gets much wrong; for, 1*mo*, It is evident from the narrative of his own disposition given him by Mr John Cockburne, with consent of Waughton, that the L.15,000 of the first sum on the wadset is what only was paid by him: it bears, for certain sums of money paid to Mr John Cockburne, but not one syllable of anything given to Waughton for his consent, which is without all onerous cause, and granted *sine omni causa*, save only Francis's acceptation of his right, with the burden of Mr John Cockburne's reversion. Not the value of a sixpence was paid to the Laird of Waughton beyond the price of a pint of wine; and however liberal Waughton was in the retailing his estate by piecemeal, yet he was not in use to give away such casualties as reversions in great to strangers, without any motive or onerosity. 2*do*, This declarator, though it were not founded on express paction and stipulation as it is, yet it could not but be esteemed most rational, just, and equal; considering how lucrative, exorbitantly beneficial, yea, upon the matter, how usurary a wadset this defender has had these 21 years, of 14 chalders of victual. I pray you, my Lords, let us consider where it lies:—in East Lothian, our land of Goshen, where land usually sells at 3000 merks the chalder. He has bruiked it this 21 years, and in his own conceit had enhanced it as his own at 1600 merks the chalder, which afforded him ten of the 100, even when the prices of victual ran in their lowest channel; and what increase and profit he had these two years bypast, when the price of the victual ruled just double of what it was formerly, I blush to tell. I shall only leave you to consider, whether or no he may not be exuberantly recompensed by so great advantage, of any expense he has upon policy and building; for I abstract from his *mala fides* in building beyond 1000 merks value, because it is so notour, so gross, and palpable, it needs no illustration. The law says, *Quicquid solo inædificatur solo cedit; et qui in alieno ædificat donasse censetur, ut et diruta domo materiam vindicare nequit. Par.* 30. *Instit. de Rerum Divisione et Acquirendo Rerum Dominio.*

I shall only say one word, that a very good gentleman, the last laird of Waughton's uncle, who was heritor of that land, and by his death returned again to the family, having been given in an appendage and portion, he dwelt in the house the Dean of Guild found there when he entered, and I believe Francis now wishes he had done the like. In respect of all which, the defender's right ought to be found

to be affected with Mr Cockburne's reversion, and redeemable in the terms thereof. As for his *mala fides* in building so sumptuous a house on wadset lands, to absorb the reversion, let the following citations be considered; for if the said Francis intended allowance for his necessary and profitable expenses, (voluptuary's ones he cannot seek,) then he must do it by way of action: this is not the place wherein that count can be received. He who buys after an inhibition, *contra jura publica mercatur, et sic mala fide possidet; cap. de Regulis Juris, in 6to, ibique Dynus in Commentario; L. 7. C. de Agricolis;* and therefore cannot repete his expenses, *per Legem* 31. *par.* 3; *Legem* 36. *par.* 4 *et* 5; *Leges* 37, 38, *et* 39 *D. de Hæreditatis Petitione; Tit. D. de Impensis in res dotales factis; parag.* 35, *ibique Vinnius, Harprechtus,* and my Poitier notes, *Institut. de Rerum Divisione;* anent wairing charges *super re aliena per bonæ vel malæ fidei possessores,* and how far their interest will be heard and admitted to repeat them. See if meliorations made upon houses may be taken away, *Hippolitus de Marsaliis singulari,* 410. If the vassal may deduct them when the feu returns to the superior; see Zoesius, *de Feudis, pag.* 145; and Gudelinus, *de Jure Feudorum, parte* 5, *cap.* 5, with the laws there cited, both Roman and feudal; vide *Legem* 58 *et seq.* and 61, *D. de Legatis,* 1*mo.** See Haddington, 10th of June, 1612, Laird of Blacater. See the informations beside me between Hugh Wat and Elizabeth Hacket; *item,* between Captain Guthry and M'Kerston in 1672. A man possessing after inhibition is not *in bona fide;* so Stairs in his System, tit. 12, of real rights, No. 33, mihi p. 162; Sinclair's Practicks in February, 1541, between two brothers called Monypennies: that their expenses must be pursued *via actionis, L. Impensæ,* 79, *D. de Verborum Significatione;* M'K.'s Observations on the Act of Parliament in 1621 anent Bankrupts, p. 141 *et sequentibus;* and for the fundamental law of our reversion, see act 27, Parliament 1649. Where an heritor consents to an absolute disposition made to one who had but a wadset before, how far it prejudges him, see Dury, 20th March, 1635, Bishop of Glasgow *contra* Mauld; 14th July, 1635, Monimusk *contra* Lesly. If a wadsetter resolve to have his expenses bestowed on necessary building sustained to him that it may be eiked to the reversion, see what form of declarator he would raise; Dury, 22*d July,* 1626, *Morison of Prestongrange* contra *The Earl of Louthian's heirs;* 29*th November,* 1628, *Mr Leviston* contra *The Laird of Basse.*

To this conclusion of declarator it was ANSWERED for Francis Kinloch, defender, That the true matter of fact being considered, the arguments founded upon that ticket bearing a declaration and acknowledgment of Mr John Cockburne's reversion, to elicit and draw from it that his right was but a wadset and redeemable, will evanish in a mere notion and sophism. For, 1*mo,* If a wadset was designed, why took Francis an irredeemable disposition? why did he not content himself with the assignation to Cockburne's old wadset? 2*do,* The said ticket and declaration mentions only Cockburne's disposition, and takes no notice that the right did flow from Waughton, and therefore neither concerns him, nor can relate to his consent to qualify, burden, or affect the same; so it has only been designed to secure Mr Cockburne, (for his name, his right, his warrandice, are only mentioned in it,) upon the account he subscribed before Waughton, who was not then in town; and for his own security he required this paper. 3*tio,* It was never a delivered evident to Waughton, but borrowed out of Mr John Cockburne's son's charter-kist; and neither mentions

* Melioramenta tam magna ut dominus quasi iis cogatur habere rem pro derelicta non sunt refundenda. *Gayll.* lib. 2, Observatione 12, in fine. See Leidington's Practiques, 30*th July,* 1564, *Bryce* against *Richardson* and *Fletcher;* and Balfour's Tit. Of Alienation and Infeftment, cap. 19, about Bigging *bona fide.*

him, nor is conceived in his favours, otherwise he would have got another of them. *4to*, The formula of this back-bond is the most inept and informal to constitute a reversion of any ever writer drew; for the true formula would have been to narrate, though Mr John Cockburne and Waughton had granted him an irredeemable right, yet it being truly designed that it should continue a wadset, therefore Francis obliged himself either to grant a formal reversion, or that his land should be redeemable in the terms of Mr John Cockburne's reversion. *5to*, If nothing had been designed but a wadset, then Waughton would never have given up to Francis the two principal contracts containing the reversion. *6to*, If he had merely intended to have surrogated Francis only in Mr John Cockburne's room as a wadsetter, he would not have resigned the superiority to Francis, to be holden of the Exchequer, which he never did to Mr John Cockburne. *7mo*, If this paper under Francis his hand had been designed to make Francis his irredeemable right a wadset, then it would have been expressed, that it was to operate in favours of Waughton, of which it has not one jot. *8vo*, These words, on which the pursuer, by so remote and absurd consequences, lays the stress of this declarator, viz. that he accepts his right with the burden of that reversion, they are no more but an extension of style, and exegetical or explicatory of, and subjoined to the immediately preceding clause, excepting that reversion from Mr John Cockburne's warrandice; and as no more was meant, (what is truly designed and acted between parties being what over-rules all writs and language,) so there is nothing more ordinary, than for writers to run out in several explications of the same thing, and to write twenty lines where one might serve: and God forbid honest people, ignorant of the laws, should be ensnared with such captious strains and detortions as this. So that it is a strange imagination to think, and confidence to say, that this trifling paper concerns Waughton, since, in the haill four corners of it, there is not one word of him, nor of the irredeemable right he had granted; which evidently evinces, and makes it undeniable to any man having the use of reason, or knows form and practick, that this declaration has never been intended for Waughton, but only in relation to Mr John Cockburne's security; so that he accepts his right with the burden of that reversion, in so far as concerns Mr John Cockburne, but not in so far as concerns Waughton.

To this it was REPLIED for the pursuer, *1mo*, There could be no more intended but a wadset, because Francis paid no more for it but the L.15,000 of the wadset. *2do*, If this clause of acceptation with the burden of that reversion, had been *in gremio* of Francis his heritable right, it would have unconvertedly made it a wadset; *ergo*, being of the same date and relative, and so *pars contractus, et pactum incontinenti*, it must have the same efficacy and force. And as for the presumptions and probabilities adduced by the defender, to persuade us that it was an irredeemable right, and to the first, that then he would have rested on the assignation to the sum in the wadset which the defenders produce; it is replied, that there is not under heaven a more convincing document, and more evident demonstration, that Francis his right was only a wadset to be affected with Mr John Cockburne's reversion. And after perusal of that assignation, it is impossible that any scruple can remain, either with lawyer or other rational person thereanent; and we thank their lawyers for their sagacity in producing the same to us, whereby their defence is infallibly convelled; for it narrates the irredeemable disposition, and assigns to the wadset money and clause of requisition, whereby Waughton was bound to give it when called for, and to the penalty in case of failyie; which is downright incompatible and inconsistent with an irredeemable right: for a man cannot give both an heritable right, and a right to the price of that same land; he could not both pay

Waughton the L.15,000 Scots, as the price of Gilmerton, and, by this assignation, have Waughton his debtor in that same L.15,000, and obliged to repay him the same when he should use requisition. If he had distressed Waughton for the money, as he might have done upon this assignation, he behoved, upon payment, to have denuded himself of the lands of Gilmerton; *ergo*, it was but a wadset: but the taking of that assignation was most proper, congruous, and consonant for a wadsetter's right.

As to the second qualification used by the defender, that this ticket produced mentions not Waughton, but only Mr John Cockburne, it is replied, The same is of no weight or moment, for style considers only the principal disponers, and finds no necessity to mention Waughton, who is but a consenter. But, *2do*, It is confessed upon all hands, that the reversion is kept up and preserved by this ticket and declaration, in so far as concerns Mr John Cockburne, and the right flows from him. Now, it is a manifest and infallible inference, that, *eo ipso*, it behoved to be preserved for Waughton; the reversion being conceived in his favours; and which could not be kept up for any other end or purpose but to give Waughton the benefit to redeem the lands when he thought fit. And it is an absolute contradiction and inconsistency to assert, that the reversion could be preserved or subsist *quoad* Mr John Cockburne, and not operate also in favours of Waughton, and those that succeed in his right; and which, to have been the main design of this writ, is clear and unanswerably evident, beyond all cavil and contradiction. As to the third, viz. that it was never delivered to Waughton, &c. it is replied, The pretence is frivolous; and we have seen it can have no other construction but to operate for Waughton. But, *2do*, Albeit by the subtilty of the civil law, *stipulatio alteri facta est invalida et inutilis*, yet, by the inviolable practick and custom of this and all other nations, now, writs conceived in the name, or containing clauses in favours, of third parties, are effectual, albeit they be not parties contractors, or the same be not delivered to them. *Vide parag. 4. Institut. de Inutilibus Stipulationibus, ibique Vinnium; vide Gudelinus, de Jure Novissimo, lib. 3, cap. 1, p. 97; item cap. 5. Imo per procuratorem, nobis tam absentibus quam ignorantibus, jus legibus Romanis acquiritur; par. 6, Instit. Per quas personas cuique acquiritur.* And how far one acquires right by a writ, though ignorant or absent; see Stairs, tit. 10, Of Conventional Obligations, § 3, 4, and 5; see Baptistæ *Additiones ad surdi Decisiones*, p. 165; see Dury, 9th January, 1627, *contra* Nimmo; *vide supra*, February, 1672, Laird of Cockburne and Haddow, No. 320, and the laws cited there; likeas, in the present case, this evident was truly common and mutual, and entrusted with Mr John Cockburne. To the fourth it is replied, That it is impossible that any writ could have been conceived in more effectual, positive, and valid terms than this declaration is, supposing the parties intend to preserve the old reversion without necessity of granting a new one, which is both ordinary and usual, and to affect dispositions with back-bonds and reversions, by writs apart. As to the fifth, Only who knew Waughton's negligence, will not admire to see how his papers squandered in confusion; but will conceive how easy it was for Francis to come by the principal reversions. Repeats the former replies to the sixth and seventh. As for the eighth, pretending the last clause is only exegetic of the first, anent the exception from the warrandice; it is replied, The assertion is so absurd and unwarrantable, that it can escape none who understands in the least what a security or the common style of any writ is; for it is undeniable but they are two separate and distinct clauses; the first, excepting Mr John Cockburne's reversion from his warrandice from proper fact and deed, was altogether unnecessary and superfluous, seeing he was secured against all imaginable hazard of recurring upon his warrandice by

Waughton's consenting to the disposition he gives Francis, and therefore it is expressed only in a cursory and transient way. What was principally intended was the second clause, positively and expressly burdening his right with that reversion. *2do*, Where was it ever heard of, that the accepting of a right, with the burden of a reversion, is an explanation of warrandice from fact and deed? This were a nonsensical illustration,—it were *obscurum per obscurius*. The proper exegesis of warrandice from fact and deed that ever was heard of, or known in style, is, that they neither have done, nor shall do, in prejudice, &c. or to except a particular right or deed from it. *3tio*, If, by both clauses, no more be designed but to secure against the warrandice, that is so sufficiently done by the first clause, that the next is utterly unnecessary, and so designs something more. *4to*, The word likeas ever, in style, signifies and imports a new clause, and different from the former. *5to*, As the words of thir two clauses are different, so they produce very distinct and separate effects in law, and which cannot be confounded; for the first clause, bearing a naked exception from the warrandice, in the congruity and propriety of words in common style, does not hinder but the right so excepted by him may be quarrelled; but whoever accepts his right with the burden of another, which is the second clause, it is ridiculous to imagine, he will [be] heard to reduce or impugn the right he hath so accepted and acknowledged; and so Francis can never be admitted, in law, to question this reversion. *Vide supra*, June, 1676, Doctor Fraser *contra* Hog of Bleriedren, No. 481. And there is not a lawyer who understands what a security means, but, upon the sight of this declaration and acknowledgment, will immediately conclude against all the impertinent conjectures accumulated, that the reversion was to stand in being, and militate against this defender. And whereas it is alleged, that the disposition, whereto Waughton consents, bears for all right of property, superiority, or reversion; it is answered, The objection is most frivolous; and all these words import no more than if it had said, "I dispone heritably and irredeemably:" and sometimes in style there is no more expressed, and at other times, again, it is extended, enlarged, and paraphrased in the foresaid words, and which be nothing but the different variations, exuberancies, and expressions of style, having the same individual effects and signification in law; and if it were not for his ticket, and the assignation he took to the wadset, there is no doubt but his disposition would carry him to the irredeemable right, and have suppressed the old reversion. As to the pretence, that Waughton subscribed not of the same date with Mr John Cockburne; it is answered, This is but a pitiful mistake; and if it were so, it quarrels the date of his own disposition, and tends to make it a false right, and not so much as to subsist as a wadset.

Duplied to the first, that Francis paid no more for it but the sum in the wadset; *1mo*, It is denied. *2do*, The land in the usurper's time was cheap, because of the great burdens. *3tio*, It is but ten or eleven chalders of muir-land victual, and so cost 2000 merks the chalder. *4to*, Sellers, in their straits, (as Waughton was, not Mr John Cockburne,) will give a pennyworth for ready money; all which may serve to wipe off these false and calumnious representations of a lucrative bargain; and he offers a tack of it to any for ten chalders of victual. As to the second, it would have made a vast difference if this clause had been inserted in the body of Francis's right, for then it would have restricted and qualified every clause, and concerned every person therein; but being in a writ apart, it extends its influence and efficacy to no more than what is found expressed in that writ, and consequently cannot concern Waughton, who is not mentioned in it, as he is in the disposition. As for the assignation to the wadset, it is strange how any man endowed with

sense can obtrude it; since it is evident, the chief thing designed in that transaction in taking the said assignation was, in case any diligence had been done against Waughton between the date of Mr John Cockburne's wadset and his subscribing Francis his irredeemable right, Francis might at least have recurred to the wadset-right as anterior to encumbrances, and bruiked thereby. Neither was Waughton in any hazard, by personal or real diligence against him, upon this assignation; because it bears in the body and narrative of it, that Francis had also got an irredeemable right of the same lands and date from Waughton.

As to the clearness of the conception of this ticket to preserve and hold up the reversion, Sir George Mackenzie confessed, that he read [it] six times over ere he understood it: and the first five times he thought it sounded and imported a reversion; but the sixth time, by help of right information in point of fact, he became convinced it meant no such thing; to shew us how plausible falsehood may be, and at how small a distance, through our darkened understandings, it may seem to be removed from truth. Upon this, Sir George Lockhart had a smart repartee,—that the five parts of his judgment was more to be trusted and credited than the sixth part, which was but the dregs and taplash of his wit, though cleared by a new light; in another part, he bade the defender ranter the two ends of an inconsistency he was urging together. Sir Jo. Dalrymple had another fling,—that the controversy was not so much for the land, as for the gaudy mounting he had trimmed it with; meaning the house he had built.

But, to return to the defender's duply.—He alleged, it was a silly ignorance to affirm, that *likeas* or *as also* ever imported and denoted a separate member, or a new clause in style; for, just contrary, it was copulative and connecting, and signified a continuation of the former subject: likeas it was convelled in a trivial instance in the dispositive words,—" wit ye me to have sold, analyied, and disponed, likeas I, by the tenor hereof, sell, analyie, and dispone;"—there it joins *verba de presenti* to the preterite time. As for the subtilty, that if Waughton subscribed after Mr John Cockburne, then the disposition will be of a false date; this is excessively ridiculous, since it behoved to be in the same month; for the resignation is past within a month: by which it appears how men obtrude their insolence upon the Lords for law, and press, with unparalleled violence, childish, foolish, and airy notions. In respect of all which this pursuer, who possesses 300,000 merks-worth of land, for 100,000 merks given out by him, and is but a mere compriser, (Waughton's daughter never having been heir, and being dead without issue,) in a strange and inhuman manner studying to grasp the defender's poor ten chalders of victual, like Naboth's vineyard, and torture the defender's ticket till it confess it is a wadset, though it was never meant nor intended among the parties,—ought to be debouted of his claim; and your Lordships, in justice, must find the defender, Francis Kinloch's right, to have been *ab initio* irredeemable, and not clogged with any reversion; and suffer him to enjoy his own house, (which is every man's sanctuary, and out of which he is not to be thrown,) built by him at the expense of L.20,000 Scots, and that in the eye and knowledge of this pursuer, without any challenge to interrupt his *bona fides*, though it be now the apple of contention, since without it the wadset were not desireable or worth the redeeming. The tenth commandment forbids us to covet our neighbour's house; and I hope your Lordships will not authorise the breach of that divine precept by a gratifying sentence. What was the old debate between the two ancient famous tribes of the Roman lawyers, the Sabiniani and the Proculeiani, (of whose discords we have sundry vestiges in the law; as, in acquisition by specification,—in determining the years of puberty,—*et circa*

materiam emptionis, venditionis, &c.) the one inclining much to the equity, and the other to strict law, seems nearly to quadrate with the present case. In points of forms and adhibiting solemnities, judges ought to be severe exactors of them; but as to the interpretation of ambiguous clauses in writs or contracts, (which is the divination your Lordships are put to here,) an equitable and favourable conjecture *quid sit actum vel verisimiliter tractatum*, for eliciting the meaning of parties, is most to be followed and embraced; *benignior sensus rapiendus semper*, l. 56, D. *de Regulis Juris*.

When the foresaid debate was ready to be advised by the Lords, then Francis Kinloch, and Sir George Mackeinzie, advocate, for him, desired to be farther heard upon a new point,—of a general discharge passed betwixt the pursuer and Francis, and which discharged and cutted off this reversion now acclaimed, and they would conjoin with their other defences, *ut quæ non prosunt singula multa juvent*. See the debate followed upon this general discharge in another manuscript *apud me*, both learned and neat, and the laws and authors there cited, viz. l. 5, D. *de Transaction.*; l. 6, D. *de Pignoribus*; act 62, Parliament 1503, and the marginal notes there; Dury's Practicks, *Dynus ad Regulas Juris Canonici*, Leithinton, and sundry others.

The Lords repelled the defence on the general discharge, unless Francis would prove by Abotshall's oath, &c.; and, before answer to the rest, ordained trial to be taken, what the land was set at, the time it was disponed to Francis Kinloch; inclining *actione quanti minoris* he had bought it, to cause him now supply and make up the ordinary price such land sells at in the country.

Then Abotshall, pursuer, sued for a farther hearing, upon a letter written by Mr James Anderson, Waughton's chamberlain, to the Laird of Waughton, and sent to him with this defender Francis Kinloch; bearing, that he had sent out, with the carrier of the letter, the disposition to be subscribed by him; but, before he subscribed it, desired him to take two lines under his hand, viz.—"I, Francis Kinloch, factor and merchant, do hereby bind and oblige me, my heirs and successors, to give and grant to John Hepburne of Waughton a letter of reversion of the lands of Gilmerton, conform to a disposition of the saids lands made to him by Mr John Cockburne, whereto the said John Hepburne is consenter; and that how soon and whensoever I shall be required thereto, conform to the former reversion granted by Mr John Cockburne, he has promised to do this."

This Abotshall produced, to clear beyond all rational contradiction and cavilation, that a reversion by Francis to Waughton was spoken of, treated, and communed on, at that time; for it was pretended Francis's ticket, produced, looked not like a reversion in favours of Waughton, but only a paper to secure Mr John Cockburne, (which I found to be the opinion of sundry indifferent lawyers, who were neither engaged on the one side nor other;) and that the assignation to the wadset was taken merely to shun intermediate diligences.

But it was ANSWERED to the letter, That there could be nothing produced more convincing that the former paper insisted on did not concern Waughton; for, if it had, what needed Mr James Andersone advise the laird to take this; which is an unanswerable demonstration, that Francis's acknowledgment, produced, has been singly and allenarly designed for Mr John Cockburne. 2*do*, This letter infallibly proves, Waughton did not subscribe at the same time with Mr John Cockburne; but that Mr John subscribed first here at Edinburgh, and then Francis Kinloch

took out his disposition to Waughton, and got it subscribed there by the laird; and this ticket of Francis's was taken from him by Mr John Cockburne at Edinburgh, before Waughton had subscribed or consented, and so neither does nor indeed could relate to the right granted by Waughton, which was not then in being; and so, not being of the same date, but prior, cannot affect, burden, and qualify Waughton's consent to the irredeemable disposition with Mr John Cockburne's reversion, unless they had a paper under Francis's hand, either granted at the time, or after Waughton's subscription. *3tio*, This letter is *res inter alios acta*, and so cannot prejudge Francis a third party, who is content to depone, that a reversion was never sought of him; and *esto* there had been a communing anent his giving an obligement for reversion, (which is the most the import of this letter can be stretched to,) unless they will offer them to prove, that a reversion was actually taken, the allegeance is utterly irrelevant, for it might have been passed from after communing.

ANSWERED,—1*mo*, This might be the paper Waughton took from him in compliance with Mr James Anderson's letter; for though it differs as to words, yet not in substance and matter. But they seem to be quite different formulas. *2do*, *Non refert* where, (whether at Edinburgh or Waughton,) or when, (whether before or after, or with Mr John Cockburne,) Waughton subscribed. He might have been in another house of the toun, and it carried to him; and the difference of hours, or a day, makes nothing, but Francis his ticket has been given and taken *eo intuitu*, to hold up and preserve the reversion *quandocunque* Waughton should sign the disposition: likeas Francis's own disposition is opponed, which bears them all to have subscribed at one time, on one day, and at one place, viz. Edinburgh, the 5th of January, 1655; and I hope he will not convell and redargue his own right of falsehood. But, *3tio*, All the use we make of this letter is for a document to adminiculate and instruct, together with Francis his own declaration, and his taking an assignation to the wadset, that a reversion runs through the whole thread of the bargain; and which three papers being conjoined together, states his right, in the case of a redeemable disposition and a wadset, so clearly and undeniably, that they amount to an ample and plenary probation; and a formal extended letter of reversion, under Francis's hand, would not be able to convince those who willingly continue unclear after so pregnant evidence. Besides, the *fama clamosa* of the whole country about was, it was only a wadset: and when he took the vanity to build that Babel for the glory of his name, his wife wept, and cried he would ruin himself, since he might be put out of it. But what encouraged him was, 1*mo*, The negligence of Waughton, and confusion his affairs had run into. *2do*, By bribing, he had got up Mr John Cockburne's principal reversions. *3tio*, For his ticket, he thought a small paper like it was either lost, or, being in a minor's charter-kist, it would never be got wit of, to rise in judgment against him. And, to shew the pursuer's detachment from all covetousness, he offers, that Francis take away his house, and leave as much as he found. Yet the Lords would not permit this, if I offer him as much as the materials, taken down and lying *in cumulo*, can be estimated or valued with; for policy is not to be thrown down, *et malitiis hominum non est indulgendum*, say the laws I have already cited. But Francis threatened, he would wair L.5 sterling more upon it, to buy gunpowder with, to blow it up first; and yet that were criminal; *non licet re sua abuti, multo minus aliena.*

Sir A. Cockburne of Lanton, about this time, gave in a bill to the Lords, craving up his uncle's son's paper, which Abotshall had borrowed and made use of,

without his witting. See the answer I made to this bill, *apud me*. The Lords ordained the paper to lie in the process till the conclusion.

Then they resumed, on the 25th of July, the advising the whole debate: the result whereof was, that, before answer, the witnesses alive, supposed to have been present at Waughton's subscription, should be examined anent the time and place of his subscription; if at Waughton, and if after Mr John Cockburne had subscribed it; *item*, if they heard anything spoken of a reversion or other paper to have been given by Francis to the laird. This nice and subtil evasion and distinction, cleaving a hair, and not of the weight of a hair in point of material justice and relevancy, was laid out as a plank to bring Francis off upon, and as a beacon and warning what Abotshall might expect if he would not settle amicably; for all thir delays were to draw them to an agreement; which upon reasons Abotshall merely declined, having been never so much abused, as under trysting and submission. Colinton offered to get him L.500 sterling, or 10,000 merks, if he would compone it; but he was inexorable, and told them, they got not salaries to be arbitrators but judges, and if he had minded to have trysted it, he had not troubled them. As this act before answer was irrelevant, so it was most unnecessary, had it not been to force a settlement; *L.* 84, *in fi. D. de Legatis, primo*; for Mr Ja. Andersone's letter produced, cleared that Waughton neither subscribed at Edinburgh, nor at the same time with Mr John Cockburne; and it was the production of this letter, (though done for clearing the President's scruples and at his desire,) that gave first umbrage and rise to that quiddity and wild notion, improving their disposition *in data*. However, in obedience to the interlocutor, the two witnesses, viz. John Stewart, then Waughton's servant, and Alexander Smith, his tenant in the mains of Waughton, are brought in and examined; and declare, so far as they remember, it was at Waughton they subscribed witnesses, and they saw subscriptions at it before the laird's, and mind no communing.

On the 27th of July the Lords advise thir depositions, and the whole process and debate, and by one vote find Francis his right irredeemable; and therefore assoilyied him from the declarator.

There were fourteen Lords sitting on the bench at the voting it; the five lawyers in the house voted it to be a redeemable right, and only a wadset, viz. the King's Advocate, Newbyth, Gosfuird, Glendoick, and Sir D. Falconer, Lord Newton. There were six votes for its being an irredeemable right, viz. Halton, Colinton, Strathuird, Pitreichie, Reidfurd, and Forret; Nevoy and Castlehill were *non-liquets* in the case; the President was not discovered, since it was gained by one vote for Francis ere it came to him, so he lurked; Craigie was Ordinary in the Outer-house.

There were two neckbrecks of this cause. The first was the Chancellor staying up stairs in the revising or treasury-chamber the time of the advising, (which he knew of,) and not only so, but detaining my Lord Kincarden with him, who was clear for Abotshall, (for Atholl, Argyle, Lauderdale, the other three extraordinares, were two of them at London, the other attending on the committee between him and the name of Macclean,) and Castlehill's neutrality, contrary to many assurances. The Chancellor's faint trinketing and tergiversation, for fear of displeasing Halton, (who agented passionately for Francis,) has abated much of his reputation. The second rub in Abotshall's way was a largess and donative of L.5000 sterling, to be given to Halton and other persons furth of the town's revenue, for their many good ser-

vices done to the town; *vide decisionem immediate præcedentem, in calce.* By this they outshot Sir Andrew in his own bow, turned the cannon upon him, *et justo dei judicio,* defeated him by the town's public interest, with which weapons he was wont to do miracles, and had taught them the way. It seems scarce allowable that judges should be permitted to be *non-liquet;* in the Roman law, they behoved first to swear *iis non constare, L.* 36, *D. de Re Judicata;* see Calvin *in Lexico, verbis Ampliare, Amplius, Liquere.* See Ærodius, and a farther note about this *alibi.*

This decision, for its strangeness, surprised all that heard of it; for scarce ever any who once heard the case doubted but it would be found a clear wadset; and it opened the mouths of all to cry out upon it, as a direct and downright subversion of all our rights and properties; though the Lords want not the pretences above set down wherewith to palliate it, beside the common topic of commiseration to deprive a man of his house, and that *jure naturæ, æquum est neminem cum alterius detrimento et injuria fieri locupletiorem; L.* 206, *D. de Regulis Juris;* and that it would teach men to be more accurate in their bargains, since negligence is never encouraged in law, but rather punished. As there is no loss but it brings some benefit with it, so Abotshall learned a lesson how foolish it is to put confidence in great men; for if they had not clinshed, he had very good reason to hope the event. God (who disposes all to the best) saw it not convenient to gratify Abotshall with this morsel, lest it had made him vain and insolent. He saw something towering in his temper, that behoved to be plained and hammered down. His blessed will is to be magnified and adored in all his dispensations; it is our undoubted interest to make an absolute resignation to him; he knows best what is fit for us; we will never be content till our wills be moulded into his; *occultum Dei potest esse judicium, injustum vero nunquam,* says the devout Saint Augustin.

Castlehill pretended he was upon his penitentials, and offered his service to Abotshall, if he could procure a stop and another review: especially since it was their usual practice, where any of the Lords were *non-liquet,* to forbear that cause till another time upon thir grounds; and lest he should be precluded as to his other separate grounds of reduction, since the *absolvitor* was from the haill process and pursuit, and that a pursuer should scarce be allowed so to manage and spin out his action as to take an interlocutor upon each point *separatim*; (see more of this *alibi.*)

He gave in a bill the next day, being the 28th of July, craving the Lords would reconsider their interlocutor, (for the Lords' explanation of the King's letter 1674 permits to offer grounds and reasons against their nterlocutors, to get them rectified, so long as they are unextracted,) especially since some of their number who were yesterday unclear are now better informed. This Halton stormed at, and said, if such retractions, *ex intervallo,* were sustained, no cause should take termination by plurality of votes, but might be reversed by head and shoulders after they were *functi officio;* and farther, desired to be farther heard, since he offered him to prove, by the defender Francis his oath, that he promised and conditioned to Waughton, (and which Francis acknowledged to Mr Jo. Scougall, Lord Whytkirk,) these lands should be redeemable from him; as also upon his other reasons of reduction, founded upon inhibitions served against Waughton before his disposition to Francis, and to which inhibitions the pursuer has right, and upon other grounds.

The Lords, by their deliverance, adhered to their former interlocutor, (this is turned their usual trick now,) and ordained it to be extracted; reserving always to the pursuer, and but prejudice to him, to prove the said lands of Gilmerton to have been

under reversion, either by Francis his own oath, or by any other writs and documents he can produce beside them he has already made use of, and which are already debated, discussed, and determined; as also reserving to him his interest upon the inhibitions, and all other his reasons not yet insisted on, as accords of the law.

Which grounds will make the subject of another discourse, for furnishing whereof the following citations may be considered.

1*mo*, That an inhibition cannot be purged by payment, where a comprising is led on the ground of it, and is expired. See the two practicks beside me, Grant *contra* Grant, in 1666; and Lady Lucy Hamilton, in 1670.

2*do*, That an infeftment may be conjoined with a preceding inhibition to exclude an intermediate infeftment, and which hinders not *extrema coire;* see Craigie's Collection, *verbo* Inhibition; out of Durie's Practicks, 3d March, 1626, Law *contra* Lady Balgonie.

3*tio*, Whether, upon payment of an inhibition, the inhibiter or his assignee will be obliged to assign it to the payer, especially where he has other rights still in his person; see Dynus and Antonius Faber; and Jo. Mitchell's case *against* Sir William Bruce, cited in a paper-book beside me.

4*to*, Whether possession must be ascribed to a comprising or to an infeftment of annualrent, (which can never properly attain the natural possession, though it may the civil and legal,) where one man has both rights in his person; see Dury, 27th February, 1630, Paterson *contra* Scarlet, and the cases there, for Handyside's Infeftment of annualrent furth of Linton.

5*to*, *Non licet idem approbare et reprobare; L.* 4 *et* 5. *D. de Legatis*, 2; *L.* 38. *D. de Legatis*, 1; *L.* 7. *D. de Bonis Libertorum; L.* 16. *D. de Administratione Tutorum; L.* 11. *D. de Usuris.* For Francis Kinloch's disposition of the lands of Cracho, of which, since we crave reduction, we cannot found on clauses therein contained; see Sir Robert Sinclair's Information for Abotshall *against* F. Kinloch.

6*to*, Where an apparent heir acquires a right of comprising, &c. upon his predecessor's estate, it is redeemable by act 62, Parliament 1661, from him, upon payment of the sums he gave for it. *Quæritur*, If this can extend to the husband or father-in-law of the apparent heir buying in such rights. *Videtur quod non*, being both a statute, and that *exorbitans a jure communi*, it cannot suffer extension.

See 23*d June*, 1680, *Mr John Maitland* against *the Lord Cardross.* See A. Perezius, *ad Titulum Cod. de Fidejussoribus, Numero* 36. *Vide* Stair's System, Tit. 12, Of Real Rights, § 27, p. 182; and Nithsdale and Buccleuch's case there.

Advocates' MS. No. 488. *folio* 252.

1676. *July.* LORD MORDINGTON, Petitioner.

THE Lord Mordington being incarcerated in the tolbooth of Edinburgh for debt, gives in a petition to the Lords, craving to be set at liberty, in regard his creditors apprisers, and other infefters, had all his estate in their possession, and he was content to dispone the reversion to any the Lords should think fit, to the effect it may

be sold for their payment. The Lords refused the bill, alleging, his lawyers who had drawn it, (Sir G. Lockhart was the penner of it,) knew not the laws nor acts of sederunt; for, by an act made on the 21st of July, 1675, the Lords ordain the creditors who incarcerate or arrest to be cited, and called, and heard, to object against the bill, (and which ought also to be by a bill of suspension, relaxation, and charge, to put at liberty,) which he had not done; and here they would not consent to his liberation upon his disponing of the Scots estate, unless he also made over to them his English interest; which, he conceived, as the Scots law could never reach, so it could never force him to denude of it; and though there were no act of sederunt for it, natural equity persuades that the parties interested be heard. *L.* 8. *D. de Aqua, et Aquæ pluviæ arcendæ.*

Then Mordington caused cite, and require them all by a notary, before witnesses, conform to the said act, and produced the intimation, with his bill. The Lords again reflected on his advocates, and found it not sufficient till he raised a summons of *bonorum*. And yet the method aforesaid might seem equivalent, and to be dispensed with in a nobleman; but he was a Hamiltonian.

Then the President, upon a bill, gave him a deliverance, permitting him to go abroad in the day time with a guard, he always returning before eight o'clock at night; it always being on the magistrates their peril if he made his escape. With which quality it was just as good as no licence; it took back with the one hand what it gave with the other; and the magistrates would not obtemper that warrant, since they could do it without such an order, if they minded to run the hazard.

At last, in February, 1667, the most part of the creditors consenting, Mordington was by the Lords set at liberty, without a formal *cessio bonorum*. Which seemed strange.

Advocates' MS. No. 491, *folio* 257.

1676. *July.* ANENT QUAKERS REFUSING TO SWEAR.

Quæritur,—What is to be done with Quakers and Anabaptists, who are also called Mennonistæ, who refuse to swear? Whether they are to be holden as confessed, if they be parties, or compelled to depone, if they be led as witnesses? Joannes Bouritius, *in Tractu de Officio Judicis, cap. nono, pag.* 18, owns the affirmative, since their humorous peevishness is not to be indulged or encouraged by law, nor the truth therefore to be concealed, else they should be in a better case than the orthodox; he also shews, *ibidem*, the way of swearing Jews, viz. by causing them lay their hand on the Decalogue, and repeating the third command, *Non assumes nomen Domini in vanum.* With us, if these fanatic sectarians be content to declare the truth, as in the presence of God, (which many of them are willing to do,) the Lords accept of that as sufficient and equipollent to an oath; as in the case of Burnet, tutor of Leys.

Advocates' MS. No. 492, § 1, *folio* 257.

1676. *July.* ANENT LIFERENTS.

Quæritur,—At how much the liferent of one can be valued, who is in actual service against an enemy, or is engaged either in the defending or storming of a town. Sure it cannot be estimated at much; for *qui utitur periculis peribit in illis*, says the wise man, in *Ecclesiasticus, cap.* 3, *verse* 27; see Craig, Feud. pag. 331, where you have four or five sundry instances of valuing things.

A woman's liferent who is bearing children is reputed less valuable than hers who is not in that hazard, though she be much older. Five, six, or seven years purchase are the ordinary steps and degrees by custom condescended upon, for buying liferents.

Advocates' MS. No. 492, § 2, *folio* 257.

1676. *July.* ANENT THE LORDS OF SESSION VOTING IN THE ACTIONS OF THEIR RELATIONS, &c.

THE Roman Law, *in lege ultima, in fine, C. de Assessoribus*, discharges *ne quis judex vel assessor sit in ea causa in qua advocanda patrocinium mutuavit, ob præsumptam affectionem:* which, though very rational, yet, to our regret, is not observed with us; for our law puts so entire a confidence in the honesty and integrity of the Lords of Session, that, by 212 act in 1594, it allows no grounds of declinator against these senators, unless they be father, brother, or son; and in *Sir William Bennet of Grubbet's* case against *Moor of Otterburne, in December*, 1671, *supra, num.* 283, they would not extend it to the King's Advocate, his brother-in-law; see M'Kenzie's Observations on the Act of Parliament 1621, p. 66; and therefore it will not hinder, nor can he be declined on this account, that he was one of the parties' advocates in that cause which is to be judged; yea, farther, in *my Lord Dumfermling's* action against *the Earl of Calendar*, which see *supra, num.* 480, Sir D. Falconer, Lord Newton, being advanced to be a Lord of the Session, voted in that cause, notwithstanding, by a declinator given in against him, he was entreated to decline himself, not only in regard he had been one of Dumfermling's advocates, but farther, (which seemed strong,) because *prodiderat et præcipitaverat judicium et suffragium suum:* in so far as the Lords having appointed that cause to be a part of his trial, by resuming the haill debate, and giving his own opinion on it first in their presence, conform to the model of trial appointed in June and July 1674; he did so, and concluded with his positive judgment in favours of my Lord Dumfermling, which the Lords repelled, referring it to his own discretion; who chose to vote, though it had been less suspicious for him to have forborne. See Anton. Mornacius, *in Observationibus ad dictam Legem ult. C. de Assessoribus.*

Advocates' MS. No. 492, § 3, *folio* 257.

1676. *July.* ANENT ALTERNATIVE OBLIGEMENTS.

In alternativis obligationibus electio est debitoris; sed si semel optaverit, consumitur optio, nec licet recurrere. Vide Tit. D. de Optione Legata; et Schotanum, *in Examine Juridico, de Concursu et Cumulatione Actionum, pag.* 187 *et seq.;* and Spotswood's Practiques, *in Principio,* (18th January, 1628, Halkerton;) yet if it be *debitum annuum* that has *cursum futuri temporis, et ubi quolibet anno nascitur actio,* it may seem probable the election binds only for that year, since the rest are not yet existent, *nondum nata. Vide Titulos D. de Annuis Legatis, Quando dies ususfructus cedat, et de usucapionibus;* upon which title Harprecht debates, *Utrum annuis reditibis præscribi possit cum quotannis nascantur.* For the Countess Dowager of Erroll's case against the Earl of Erroll, anent an alternative obligement in her contract matrimonial, providing her to 70 chalders of victual, or 100 merks for each chalder; *vide* this determined, *infra,* 17th January, 1677, No. 533. *Vide* E. Brouchorstium, *ad Legem,* 75. *D. de Regulis Juris.*

Advocates' MS. No. 492, § 5, *folio* 258.

1676. *July.* ANENT ARRESTMENTS.

IN competition between two arrestments, the first arrestment is laid on by a bond and debt, whereof the term of payment was not as yet come; a second arrests after, and pretends preference, in regard his term of payment was come, and the other's diligence was nimious and preposterous; for I suppose them both equal as to the pursuing to make arrested goods forthcoming.

The Lords found, on the 3d of July, 1628, *Scot,* that arrestment might lawfully be used on a bond, whereof the term of payment was not come. But on the 19th of November, 1623, *Ker* contra *Colthird* and *Patersone,* they found the contrary, unless the negative particle, *Not,* be there redundant and wrong inserted. But a second question arises more knotty, where the term of payment of the debt that is arrested is not come the time of the first arrestment, and is past the time the second arrestment is laid on,—*Quæritur,* If the second arrestment will be preferable to the first, since the law *non amat nimium diligentes?* Dury, *20th March,* 1633, *Sympsone* contra *Whyte,* tells, the Lords found that *pæcunia debita ad diem* might be arrested before the day of payment of it came, for here the obligation is presently effectual, albeit the solution be superseded to a day: *cessit dies, licet nondum venit solutionis exactio, L.* 213. *D. de Verborum Signif. sup. No.* 48, February, 1671. (Vide *parag. secundum, ibique Vinnium in Commentario, Institut. de Verborum Obligationibus. Vide 17th July,* 1678, *Pitmedden and Paterson.*) It seems debts *ad diem* may either be the foundation of an arrestment *activè,* or the subject of an arrestment *passivè,* before the terms of payment come, because *debitum vere subest;* but where the debt is conditional, during the dependence or not existence of the condition, no arrestment or other diligence can validly affect these debts *passivè,* or be done upon them *activè,* if any middle diligence depending on a debt not conditional intervene, or arrest a debt after the condition of the debt arrested exists; for if no impediment interpose, it is reasonable that the diligence convalesce and

turn effectual, when the condition either of the debt arrested or arresting is purified: *ex lege* 14, *D. de Pignoribus, quis potest persequi pignus, licet dies debiti sui nondum venerit.* Upon thir principles is also grounded that disparity of transmission by succession, where the creditor in an heritable bond dies before the term of payment, for then the debt falls to his executors and not to the heir, because the heritable destination had not as yet taken effect. *Vide Dury*, 10th March, 1630, D. Lindsay *contra* Town of Edinburgh; see 51 act, Parliament 1661.

Here arises a third question,—A creditor by an obligement under his hand, supersedes execution upon such a bond for a certain space, within which time he finds it necessary for him to inhibit his debtor; the inhibition is quarrelled, as contrary to the paction. It is ANSWERED,—Inhibition is not an execution, but merely a diligence for security of his sum. The Lords found it so on the 15th of June, 1669; (see it *supra*, between Brown of Gorgiemilne and Kinloch.) *Vide supra*, June, 1673, No. 399. [Birnie *against* Crawford.]

Advocates' MS. No. 492, § 6, *folio* 258.

1676. *July.* ANDERSONE *against* ANDERSONES, HER STEP-SISTERS.

JAMES ANDERSONE, a merchant in Edinburgh, provides, in his first contract of marriage, a tenement of land he had, to the children of that marriage; he has only one daughter by this marriage; her he bestows in marriage to a mason, and gives him 7000 or 8000 merks of tocher, but takes a renunciation from him and her, she being past 21 years of her age, as to the tenement provided to the bairns of the marriage by her mother's contract-matrimonial, and a full discharge of her right thereto; and then he marries a second wife, by which bed he had two daughters; he dies without disponing that tenement to any. The daughter of the first marriage claims it as being in fee of it, at least pretends to be an heir-portioner as to a third part of it. The two other oppone her renunciation. She answers, she did only that in favours of her father, to give him a power to do with it what he pleased, and not in favours of them, who were not then in being, and he not having used it, her right convalesced, recurred, and accresced. The case seemed so dubious, and the conception of the renunciation so scrimp and narrow, that the daughters of the second marriage were, by their lawyers, advised to give the first somewhat for a composition.

Vide M'Keinzie's Observes on the act 1621, p. 75 *et seq.* See *Codex Fabrianus ad Titulum de Pactis Conventis, tam super dote, &c. definit.* 10 *et* 12, *pag.* 562.

See the learned Franciscus Corvanus, *Commentariorum juris Civilis libro* 5, *cap.* 5, where he proves that pactions renouncing their future paternal inheritance are reprobated in law, even though they be confirmed by an oath, which the canon law maintains, the iniquity whereof he there demonstrates; see the Baron D'Isola's Buckler of State and Justice, where he argues the validity of the Queen of France's renunciation to all succession, paternal, maternal, fraternal, sovereignal, against the French lawyers, Aubrey and others, who impugn it.

Advocates' MS. No. 492, § 7, *folio* 258.

1676. *July.* ANENT THE MARRIAGE OF RELATIONS.

JOHN SUEIDIVIN, in his commentary *ad tit. Institut. de Nuptiis, ubi tractat de gradibus cognationum, in 3tia regula, pag. mihi* 79, 80, *et* 81, maintains, from *Cardinalis Hostiensis*, &c. that collaterals, distant in the fifth degree, may marry lawfully together; *ex. gratia*, my good-son's brother might marry my daughter. And it is not enough to say, that cannot fall out through the brevity of men's age, that one can scarce see the fourth or fifth generation, either direct or collateral; or, *2do*, if he did see it, it were a most unequal disparage for years; because this is but tergiversation, and, if it did exist, we behoved to answer from some rule and principle in law. My objection against the lawfulness of such a marriage is, that, *jure civili*, not only *ascendentes et descendentes in recta linea* are prohibited to marry together *in infinitum*, but likewise *ii qui vicem locumque parentum et liberorum inter se obtinent; parag.* 1, *Institut. de Nuptiis*, L. 53. D. *de Ritu Nuptiarum*; now a great-grand-uncle is in room of a parent to his abniece. See Vinnius, *ad dictum par.* 1, *et par.* 3 *et* 5, *Instit. de Nuptiis*; and moral honesty seems to avoid such a congress. *Vide Constitutionem* 2. *Alexii Commeni, et Constitutionem* 2. *Isaaci Angeli. Vide supra*, November, 1671, No. 257.

Advocates' MS. No. 492, § 8, *folio* 238.

1671 and 1676. RICHARD MAITLAND of Pitreichy *against* GORDON of Geicht.

1671, *June 13th.*—RICHARD MAITLAND of Pitreichy having, in December, 1669, obtained a declarator of recognition against Gordon of Geicht of the lands of Geicht, thereafter, *ex gratia*, he enters into a minute with him, by which he obliged himself to dispone to Geicht, at the sight of men of law, the said recognition, and to secure his lands from all possible hazard that might result therefrom; on the other hand, Geicht was bound to ratify some unquarrellable wadsets that Pitreichy had upon these lands, as also to pay him in a certain sum of money for the foresaid communication of his right. Thir articles, it seems, Geicht was unwilling to fulfill, and being required, refused; whereupon Pitreichy raises a summons of declarator of the nullity of the said articles, in respect Geicht has failyied to fulfill his part thereof; in respect whereof, he craves to be liberated thereof, and so reponed to his own place, as if such articles had never been condescended on.

It was ALLEGED,—The summons was most irrelevant, unless they could say, (which was not,) that the said articles contained an irritant resolutive clause in case of not performance; but they containing no such irritancy, there is no man in law or reason will maintain, that such articles will afford any more save an action for implement: and if Pitreichy will turn his libel into an action craving performance, then Geicht *pari passu* as the pursuer fulfills to him his part of the said obligement, so shall he perform to him, (neither was he ever unwilling;) and what day he takes to produce a valid disposition, he will take the same to pay him his money. *Vide infra*, No. 209.

The Lord Halkerton inclined to convert it into an action for implement; reserving always to the Lords their consideration of the pursuer's damage and prejudice,

and charges he has been at, through the defender's delay of fulfilling the said articles, to be modified by them as they shall find cause. Yet he was to give them the Lords' answer thereon.

Advocates' MS. No. 166, *folio* 97.

1671. *July 5th.*—In this cause, (which *vide supra, ad num.* 166,) it falling to be debated, whether or no Pitreichy might not change and convert his action of declarator of nullity of the minute passed betwixt him and Geicht, into an action for maills and duties against the tenants of the lands of Geicht, as being his own property, he being donatar to the recognition, my Lord Craigie was pleased to give them the Lords' answer thereon: who found, it could not be turned; especially considering that there was none called in the declarator of nullity save Geicht himself; whereas, in an action for maills and duties, the tenants mainly must be called. Yet in regard my Lord Halkerton had never reported the dispute in the said declarator of nullity, therefore the Lords ordained him to hear them over again on these points.

Advocates' MS. No. 198, *folio* 101.

1671. *July 8th.*—In the foresaid cause of Pitreichy and Geicht, (which, at the No. 198, was referred to my Lord Craigie to hear,) it was ALLEGED for Pitreichy, That albeit the articles could not be declared null, in regard they contained no irritancy, yet his declarator behoved to stand good, *ad hunc effectum*, that the whole maills and duties of the barony of Geicht must pertain to the pursuer, from the date of the minute, for all the terms that have intervened since, and in all time coming, so long as Geicht shall be *in mora* of not fulfilling his part of the said articles.

My Lord Craigie offered to decern the articles to be fulfilled *hinc inde, ad hunc effectum*, that, since they wanted a clause of registration, they might charge upon his decreet; and, in case of not obedience, denounce and registrate at the horn; which being done, will have the same force for annulling the minute that a clause irritant would have: or he would ordain Geicht to pay the sum he stands obliged in to the pursuer, *cum omni causa;* that is, not only with its annualrent since the date of the minute, but also all cost, scaith, damage, and interest sustained by the pursuer, in default of the defender his delay to perform the obligements lying upon him. Anent the question, whether, in a mutual contract, the failyie of the one to fulfil his part after he is required thereto, operates so much as to liberate the other wholly of the said contract, (which was the case betwixt my Lord Ramsay and my father;) *Vide* l. 14 and 17, C. *de Transactionibus Ferrariens. in pract.* 36, *Ut pacta serventur, et ibi doctores.*

See 15th February, 1681, Wood and Shanks. *Vide* l. 14. *ibique Gothofredum*, D. *Pro Socio. Vide Nicollaum Mozzium, de Societatis Contractu*, p. 633, and the laws there cited.

Advocates' MS. No. 209, *folio* 103.

1671. *July 13th.*—In the point taken to interlocutor at No. 209, betwixt Pitreichy and Geicht, the Lords found Pitreichy had right to the haill maills and duties since the date of the minute, and in all time coming, aye and while Geicht pay the sum contained in the said articles; and assign the first of December to fulfil *hinc inde* each one to other: and, in case Geicht perform not betwixt and then, the Lords will receive Pitreichy to allege the nullity of the articles; and if he fulfil,

then the Lords, at that same time, will modify what they truly find to be Pitreichy's damage through the delay.

Advocates' MS. No. 219, *folio* 104.

1676. *July.*—In the decreet of declarator of nullity of the minute, passed betwixt my Lord Pitreichy and Gordon of Geicht, about the recognition of Geicht's lands gifted to Pitreichy, in regard of failyie in performance, and which was assigned to the Earl of Aboyne, (*Vide supra*, July, 1671, Nos. 166, 198, and 209, between the same parties,) the Lords reponed Geicht, notwithstanding the decreet upon the commission of the failyie, and admitted him to the benefit of the said contract, he performing the heads and contents thereof. Which was *bene judicatum.*

Advocates' MS. No. 492, § 4, *folio* 257.

1676. *July.* SIR DAVID CARNEGIE of Pittarrow *against* ———

SIR DAVID CARNEGIE of Pittarrow having charged on a decreet, and being ready, after the days of the charge elapsed, to poind; a stop from the Ordinary on the Bills, is presented, superseding execution till Saturday. Saturday comes; and Pittarrow sends to see if they either had procured a suspension or prorogation of the stop; none of which they having, he caused poind. Upon this he is pursued before for a pretended riot, since he should have suffered that whole day which was expressed in favours of the debtor, (and *in casu dubio favorabiliores rei quam actores, et respondendum potius pro reo,*) as the law says, *totus ille dies ex æquitate et humanitate est debitori relinquendus; par. 2, ibique* Vinnius, *Institut. de Verborum Obligationibus, par. penult. et ult. Instit. de Inutilibus Stipulationibus.*

PITTARROW ANSWERS,—That a stop till Saturday, in congruity of all language, can never include Saturday within the stop, but is exclusive thereof. *Dies termini ad quem non computatur in termino,* (*vide supra*, November, 1673, Somervell and Beg, No. 424;) that *esto* it were included, yet a probable cause of doubting *excusat a spolio,* and the most it can infer is restitution.

REPLIED,—That *dies adjectus semper refertur in tempus finitum, non in tempus inchoatum;* l. 13, 41, 42, 56. *par.* 5, 138. D. *de Verborum Obligation.;* Vinnius, *ubi supra:* That the Latin words *donec et usquam ad,* are not so much *particulæ illativæ futuri,* as *affirmativæ vel negativæ præteriti;* as the learned *Fredericus Spanhemius* shews in his *Dubia Evangelica, tomo* 1^mo^, *dubio* 28, *pag.* 230. in his explication of these words of the Evangelist Matthew, that "Joseph did not know Mary till she had born her first begotten son;" which words he elegantly proves, by twenty parallel instances drawn from other scriptures, against the Helvidians, that they do not denote, nor import that she continued not a virgin, and that Joseph knew her after; and that such words do not signify *finem sed continuationem actus.*

In this cause it was queried at Sir G. Lockhart, If Arbuthnot's servants, who were apprisers of the goods, can be in any hazard as accessory to a spuilyie, though the poinding were illegal, because of a stop upon a deliverance of the Lords of Session only intimated to Pittarrow. He answered, That in law there could be no

imaginable hazard, they being but naked apprisers, and sufficiently warranted by the letters of poinding; and that it has been frequently so decided.

Advocates' MS. No. 499, *folio* 261.

For the further knowledge of what Decisions passed amongst the Lords, from July, 1673, till December, 1674, (at which time Sir George M'Keinzie's book of Observations upon the Act of Parliament 1621, against Bankrupts, was given in to be printed,) and for the rendering this collection of Practiques the more complete and perfect, I have excerpted summarily, and compendiously drawn furth into this place, all the Decisions of the Lords, observed by him in the said book, from July, 1673, till December, 1674, in regard our observes are but thin and few that space, being deprived a part of it; and which I have only marked with much brevity as to their dates, persons' names, and page where it is, because it may be read in the book itself.

Imprimis, Marjorie Haliburton, relict of Hugh Watt, *contra* Morison, p. 24 and 96. *2do*, Lindsay *contra* Gray of Hayston, February, 1674, p. 35. *3tio*, Waugh in Selkirk, p. 41. *4to*, Street and Jackson, Englishmen, *contra* Mason, 2d July, 1673, p. 47. *5to*, December, 1673, Reid of Dandilling, p. 58. *6to*, Spencerfield *contra* Kilbrackmont; More and Laird of Gruibet; 5th July, 1673, Home *contra* Smith; *item*, Waughop *contra* Major Biggar, p. 66. *7mo*, Bannerman of Elsick *contra* Hayston; 2d July, 1673, Gordon *contra* Fraser, p. 80. *8vo*, Russell *contra* —; Grahame and Stewart, December, 1674; Campbell *contra* Campbell, p. 81 and 82. *9no*, The same Campbell and Campbell, December, 1673, and Stewart and Grahame, p. 115 and 117; *item*, Home and Smith's case again, (which I have marked *supra*, No. 402,) p. 120. *10mo*, 7th February, 1673, Dame Elizabeth Burnet *contra* Sir Alexander Fraser, p. 127. *11mo*, George Cockburne of Pilton and Hermiston's Creditors, p. 130, done on the 3d December, 1674.

Nota.—Beside thir decisions I have here pointed the finger at to be considered there, there be several others, preceding that date of 1673, which I refer to be seen in the book itself.

Advocates' MS. No. 500, *folio* 262.

I have also several Decisions and other Law Remarks belonging to this last Summer Session, 1676, (for as to remarks and observations of law written by me, in haste, upon loose and dispersed papers, such as came to hand for the time, besides what is contained in this Collection *ordine temporis*, and that separate paper-book I wrote in June and July last, I have infinite numbers of papers, which were an impossible labour for me to draw unto this place; therefore see a short inventory of them,

compendized and drawn like an index and memorandum of the heads where they lay, without any order imaginable;) which notes, belonging to the last Summer Session, I have written in a MS. by itself; and, in regard this was the proper place of these Observes, therefore I shall, *digito quasi*, hint at the generals therein contained that are relative to this last Session, in which I may be the shorter, both because they may be found where I have written them, as also in regard I have engrossed some of them in one or other of the above-mentioned Decisions. In which book the following things are to be found:—

1*mo*, That the Lords of Session will receive relevant exceptions *quocumque tempore*, if instantly verified.

2*do*, *De curatore surdo dato;* see it enlarged, where I tell that Sir George M'Keinzie is adjoined to the King's advocate.

3*tio*, Anent the Lords interponing their authority to vendition of minors' lands.

4*to*, Of dispossession, and bruiking the fruits *bona fide*.

5*to*, About pursuing a messenger for deprivation.

6*to*, Anent a strange clause of registration and warrandice under an oath, and citing the King by his officers of state. Of the King's depriving the clerk-register. Anent pursuing declarators on the expiration of the legal of a comprising. Of the old style of bills to the Lords of Session. In how few a number a community may subsist.

7*mo*, In July, 1676, in Alexander Somervell's cause against Gilchryst, the Lords modified what the liferentrix should pay for upholding her liferent lands. *Vide infra*, No. 503, thir same parties, 8th November, 1676.

8*vo*, Craigie, as Justice-Clerk, nominated the clerk to the Border commission.

9*no*, In July, 1676. When a man's land is thirled to an heritor having two mills, the Lords left him at his choice to go to any of them.

10*mo*, Anent the convention of burghs, their fining Alexander Rosse, commissioner from Dornock.

11*mo*, Anent valuing parsonage teinds, &c. Escheat falls, though denounced not at the cross where the lands lie, but where the party dwells; see this marked *supra*, in the Marquis of Atholl's action of declarator, § 2, about the competition between equity and strict law. Anent the heiress of Craigleith her marriage. Anent the contracting Strathuird's daughter to the Marquis of Atholl's son, though both infants. How many several ways a wadsetter's heir, that is to renounce his wadset on an order of redemption, may establish a right and title in his person, without entering heir, that he may dispone and renounce validly. That the accepting a right with the burden of a reversion is an acknowledging the reversion, but not where it is allenarly excepted from the warrandice. See both thir two, *supra*, in Sir Alexander Frazer's case *contra* Hog of Bleriedren, and Sir Andrew Ramsay's *contra* Francis Kinloch.

12*mo*, Anent the dilator of one's being out of the country. And if the Lords' decreet of improbation should prove *injudicio criminali*, as in Kennedie's case. And how far other children beside the apparent heir may pursue exhibition *ad deliberandum*. Anent the ignorant conception of many testaments and contracts matrimonial in Scotland, and about the three several ways of conceiving destinations and

clauses of conquest in favours of children of the marriage; which see marked, *supra*, in Catharine Mitchell's cause *contra* Littlejohns.

13*tio*, That Dumfermling's subscribing his father's count with James Deans was not a becoming liable for it. Anent long pleading and pertinent exordiums. Anent the officers of the militia. And the defender's condescending on the date of writs sought to be improven.

14*to*, That a general discharge of sums of money does not comprehend a reversion, in July 1676; see it *supra*, Sir A. Ramsay *contra* Francis Kinloch.

15*to*, That one is obliged to assign an inhibition on payment, John Mitchell *contra* Sir William Bruce.

16*to*, Anent a decreet *cognitionis causa*, summarily to be given; see it *supra*, John Nasmith *contra* William Hally.

17*mo*, In the late adjudications introduced in 1672, the bond needs not be registrate.

18*vo*, I cannot debar a defender with horning, to whose oath I refer my libel, so found July, 1676. *Vide infra*, No. 517, *in principio*.

19*no*, The Lords annulled Whyte of Thurston's disposition granted by him to B. Carmichael, both because done *in fuga et conjunctæ personæ*. *Eodem tempore*, Anent the hindering Mr Robert Deans and other heritors to rebuild the burnt land.

20*mo*, Anent the King's power in erecting a sheriffdom; anent judges being *non-liquet*, and a pursuer's spinning out his separate grounds one after another; as to which see Sir A. Ramsay *contra* F. Kinloch, *supra*.

21*mo*, Anent valuing the teinds of mensal kirks, &c.

22*do*, If a simple tenant can sublocate to another.

23*tio*, If a bond granted to a person lying in prison be good and unquarrellable, *ex capite metus*. And what if a person give over a house 40 days before the term of Whitsunday, or be not entered 40 days after the term?

24*to*, How long those that are thirled are obliged to attend at a mill broken, or wanting water. Of what sums bearing annualrent and made moveable the relict falls a third, or can be debarred. And what if the creditor or debtor in the bond die before the term of payment come. With sundry other remarks there which deserve well to be read and considered, and, therefore, without adding any more, I refer to that place.

See a continuation of thir remarks in October, 1677, No. 643.

Advocates' MS. No. 501, *folio* 262.

WINTER SESSION 1676.

1676. *November* 8. KINNEAR *contra* ———

ONE having sent his son to London, he finds trust and credit from a merchant-factor there; the father not knowing thereof, writes a letter of advice to that same factor, desiring him, upon his score, (this is what the law calls *pæcunia constituta*, and which *Paul* offers to *Philemon* in behalf of *Onesimus*) to advance (furnish) what his son should call for, and he should pay it. Upon this letter the father being pursued to pay the money he had given his son before that letter came to his hands; the DEFENCE was, he could not be liable for that which was not given *illius intuitu vel contemplatione*, and wherein he had only followed the son's own faith, and the recommendatory letter only warranted posterior givings. Whereunto it was ANSWERED, That even the first lending was *intuitu* of the father, and from respect to him, for which he ought not to suffer; that the letter was of the nature of a ratihabition, *quæ comparatur mandato;* that it did not restrict to subsequent givings, but was indefinite, *quæ universali æquipollet.* They were to have the Lords' answer on it.

I think, in equity, the father should be liable; especially if the sum advanced was moderate, or anywise *in rem vel patris vel filii-familias versum:* and the factor seemed to be founded *in utili actione, Quod jussu*, though not *in directa*, since the supervenient letter may be esteemed an interpretative homologation of what should be advanced to his son; and in material justice, *nihil patri deerat*, he had no prejudice, for if that money had been paid in to his son, after the receipt of his letter, he could have made no cavilation whereupon to have shunned the payment of it: *et non refert*, that it was paid him before the order; which must be retrotracted, else the merchant's civility should be dommeagable to him, and *pater dolose lucraretur cum ejus detrimento.*

In the Roman law, the father was liable for his son *in familia tam noxaliter*, in case of a *delictum*, or *quasi quam civiliter* for his engagements, *quatenus erat in peculio filii cujus peculii pater erat dominus et administrator;* except only in the case of *mutuum filio-familias datum*, against which the father was secured *per senatus consultum Macedonianum.* But if the father employed the son as excercitor or institor, then who contracted with the son had those actions, or rather proper qualities and adjections to actions competent against the father constitutent, viz. *exercitoriam, institoriam, tributoriam:* if it was *in rem versum*, then they had the action *de in rem verso;* if there was a mandate intervening, then *quod jussu* took place; see those titles *in Pandectis.* With us, things furnished to a son *in familia tacite*, oblige the father, if they were profitable and useful, as aliment or abulyiement, and no other allowance given by the father *eo nomine* for them, and were conform to his quality. *Vide supra*, a like case, November 1671, Christopher Le Noir, Frenchman, *contra* Jo. Brown, No. 245.

Advocates' MS. No. 502, *folio* 263.

1676. *November* 8. SIBILLA MOODY and ALEXANDER SOMERVELL, her Husband, for his Interest, *against* WILLIAM GILCHRYST, and his Tutors.

Supra, [Page 100,] at No. 501, the seventh article thereof, reference is made to another paper-book, where there is a remark, that in July 1676 last, the Lords, by their decreet, ordained the said Sibilla, as liferentrix, and her husband, for his interest, to uphold her liferent lands, and modified 800 merks for the doing of it, and ordained the said reparation to be made betwixt and the first of November then ensuing.

Upon this decreet Alexander Somervell being charged 14 days before the first of November, so that the days of the charge was run at the first day, and being denounced, and a caption taken out against him, he presented a bill of suspension on thir reasons.—1*mo*, Because the charge was preposterous, since a decreet *ad factum præstandum* betwixt and a day, introduced and determined that day in favours of the *debitor facti*; and till that definite time were past, *non poterat constare* if the Lords' sentence was obeyed or not, so he had all that *laxamentum temporis:* and as in a bond one cannot charge before the term of payment, so neither here till the day was elapsed; *ergo*, the charge, denunciation, and caption, is null. The other reason was upon obedience, that the tradesmen were actually working, and condescended on sundry reasons why it was not finished. See all thir more largely in the information of the reasons *apud me*. And for proving this, produced an attestation of the tradesmen, and therefore craved a farther time for accomplishing the same, he not being *in mora*. And, farther, I urged the 226th act of the Parliament 14 James VI., in 1594, allowing liferenters a year to repair, but that act seems to be in another case. [Yet see Dury, 17th December, 1623, E. of Galloway and Vauns.] My Lord Newton, who was Ordinary upon the Bills when it was presented, waved the first reason as dubious and not so material, anent the illegality of the charge, and prorogated the time till the 10th of December, betwixt and which he should perfect the reparation, and, in the mean time, stopped execution.

At that day, the chargers wakening the bill, I ALLEGED the charges now behoved to be *simpliciter* suspended, in regard Somervell had fulfilled the decreet, and repaired sufficiently, and made it water-tight and wind-tight.

ANSWERED,—He could not have repaired it perfectly, since he had not waired 400 merks on it, and yet the Lords had found it would, by the depositions of tradesmen, require 800 merks.

REPLIED,—His interest being only by his wife's liferent, which might die and cease ere a month, he was not obliged to take down walls or fore-stairs that tradesmen told him would stand 12 or 20 years, or lift floors and lay new ones; but he offered him to prove he had made it in better case than it was in when he entered to it, which was more than could be demanded; for the liferentrix's error was, she had not caused take cognition of the condition (which might have been ruinous and bad) the time of her entry, which is the only rule and standard of all her future reparations, And as for the Lords modifying 800 merks, it did not tie him to expend that, for if he got it repaired gratis or cheaper than another, for mutual services, it was nothing to them; that was named as the *maximum quod sic et ne plus ultra*. 2*do*, Tradesmen's declarations in such cases are suspect, it being *in suum commodum et rem propriam*, hoping they, or others their friends, will get the employ-

ment, for which reason they will call things ruinous that are not; yet where they are voluntarily, and not judicially assumed for their opinion, they will be ready for inveigling and insnaring persons once to enter in a bargain with them, to say it may be done much cheaper than truly it can be done for, and after they are engaged, then desert the work till they make a new agreement, since no other will take their work in hand; against which we have an act of Parliament, Act 80, Parl. 5, James I., in 1426, and the Roman law there cited.

Newton, before whom it still lay, being tabled before him, ordained the Dean of Guild of Edinburgh and his Council to visit and report if it was sufficient. Both parties had declarations under tradesmen's hands, (to show what cattle they are,) the one asserting the reparations sufficient, and the other affirming they were insufficient; but Newton regarded them not. The Dean of Guild being tried, he shifted. Whereupon we represented to Newton, that the Lords had by their decreet set down the way and method of their trial, for they ordained the reparations to be made with the advice and at the sight of the deacon of the wrights and deacon of the masons; (though there was no mason-work in it, but wright and slate work, so it should rather have been the deacon of the slaters, for *credendum est artifici in sua arte.*) Newton finding that, by the decreet, would sustain no other way but that which the Lords had already appointed; and so made an act upon it, and allowed either parties a diligence to cite the said deacons, first to sight and visit, and then to compear, and upon oath declare if it was sufficient or not.

Upon this, three scruples occurred, 1*mo*, If it should be the last year's deacon who officiated the time of the decreet in July last, or the deacon that came on at Michaelmas, who was meant. Newton declared it was the former deacon. 2*do*, In the Cannogate the masons and wrights had not two deacons, but only one. Newton found none else could be made use of but that one. 3*tio*, This being a bill of suspension, Sir William Bruce, nor those under him in the bill-chamber, could not, nor were not in use to give out such acts and diligences; therefore, when debate is on a bill of suspension and acts made, the matter falls in the hands of the clerks of Session, and one of them must be chosen, as was done here. The chargers trinketed so far with the deacon by drinking, that they impetrated a declaration under his hand somewhat unfavourable, as if all had not been fully repaired, which was *proditio testimonii;* and they were so gross as to cause Charles Oliphant, clerk, insert this in the body of the act whereon he was to depone; but, upon application to Newton, he reproved them sharply, and ordained it to be deleted and expunged. This deposition was so fair, that the chargers have never thought it worth their pains to seek the advising it; (*Quæritur*, if Newton alone, since it was done on a bill before him, or the haill Lords must advise it, and if it must be enrolled and bide its time?) so that Mr Somervell is not yet fully assoilyed. *Vide infra, No.* 519. [*Wood and Shanks* against *Murdoch*, 12th December, 1676.]

Advocates' MS. No. 503, *folio* 263.

1676. *November* 8. JOHN FINDLAY, Waiter in Leith, *contra* THOMAS ROBERTSON, late Treasurer in Edinburgh.

FINDLAY having charged the said Thomas upon a decreet of the Sheriffs of Edinburgh for L.172, contained in a subscribed account, it was suspended on this reason, That the truth of the account, and articles thereof, being referred to Thomas his oath, his procurator, without his knowledge, had taken a day to produce him, and not being advertised, the term was circumduced, and he holden as confessed, and decreet given against him; whereas he in manner foresaid purged his contumacy, offered to refund to the charger the expenses of the decreet, condescended on the exorbitancy of sundry of the articles, and craved to be reponed to his oath.

Strathuird inclined to repone him, but they opponed the decreet, and no reasonable cause alleged to take off contumacy, such as sickness, absence forth of the town at that time, or the like; whereupon we deferred the truth and reasonableness of the articles of the count to the charger's own oath, who compearing, deponed the same were just and true: whereon Thomas Robertson agreed with him, and gave him his money. See the information *apud me*. *Vide supra*, December 1669, Semple and Walker, No. 6.

Advocates' MS. No. 504, *folio* 264.

1676. *June and November*. The EARL of SOUTHESK *contra* Mr JOHN ELEIS, Elder of Eleiston.

June.—THIS is an exhibition of some writs of the Countess of Dirleton's. ALLEGED against delivery, That he cannot denude of the right of the bond produced till, *Primo*, he be relieved of his cautionry for the Countess, as executrix in the Earl's testament. *Secundo*, He cannot denude with reservation of a fifth part of the sum, because, by a contract betwixt the pursuer and him, it is declared he shall have right to a fifth part of what shall be recovered, both for his pains, depursements, and discovery.

ANSWERED, *Primo*, He ought not to detain the pursuer's evidents on that pretence, they not having been deposited and put in his hands on these terms, that he should have right of retention till he be relieved. *Secundo*, He cannot condescend upon any distress, existent or apparent. *Tertio*, To take off all cavil, the Earl is content to find caution to warrant him. To the second, answered, that the transaction in the contract is unjust, unlawful, and exorbitant; because, *Primo*, *Pactum de quota litis*, he being an advocate. *Secundo*, Taking acknowledgment for discovering what *ex bonâ fide* he was obliged to do *gratis*. *Tertio*, This needed no discovery, for they knew this particular bond. *Quarto*, The contract relates to the common interests among all the daughters of William, Duke of Hamilton, whereas the Lady Carnegie has *jure proprio* right to this.

REPLIED, To the first, he is content of sufficient caution. To the second, *Primo*, It was not *pactum de quota litis*, nor fell under the 216th act of Parliament in 1594, discharging the buying of pleas, because he was not then an advocate. *Secundo*, The penal sanction of that act of Parliament is only deprivation of the doer, not omission

of the cause. See Catherine Home's information *apud me*, against Mr Archibald Nisbet, writer to the signet; where the Lords inclined to find, that if there was a previous communing before the intenting and raising of the action, and a part offered, and the same accepted, by a member of the College of Justice, the same was not a reprobate *pactum de quota litis*, because there was no plea then depending. But really this is only a subterfuge and palliation to such villainies. See *Bouritius de Officio Advocati*, pp. 8, 9, and 10; *item*, cap. 44, p. 337, *et seq.*; where, *ex lege*, 5. C. *de Postulando*, he shews such pactions are unlawful, either when the plea is already intented, or when the client has discovered the secrets and mysteries of his cause; but if *res* be *integra*, and the action not raised, he does not condemn a paction then, yet commends such as forbear. Vide *L. 3. D. de Litigiosis; Tit. C. Ne liceat Potentioribus Patrocinium*, with the two following titles; *Dury, penult.* July, 1635, *Richardsone. Secundo*, The taking of an acknowledgment is no violation of his trust, for when a thing is given more *honoris et remunerationis gratia* than *quasi prætium et merces operæ*, it hinders not but it still remains to be gratuitous, and of the nature of a mandate: *L. C. Si remunerandi, D. Mandati.* See the rest of the reply in the informations *apud me*. See Connanus *in Commentario Juris Civilis, libro 5*, cap. 5. *Vide* the Lords' interlocutor on this matter, *infra*, No. 507, [17th November, 1676,] and 509, [Weir *v.* Ruthven, 24th November, 1676.] See 23d June, 1680, Weir and Ruthven.

Advocates' MS. No. 482, folio 249.

November 17.—The Lords having this day advised the debate, *supra*, No. 482, in June, 1676, they found Eleiston was not obliged to denude of the right of the bonds, till, first, he were sufficiently secured against his cautionry in the Earl of Dirleton's testament. 2*do*, That he was only to denude of four parts, and retain a fifth part of the haill to himself, without being *pactum de quota litis*. Found, by the contract of marriage between Southesk and his lady produced, the old Earl had no right to that bond, as was alleged, but the same belonged to the present Earl, *jure mariti:* Found Eleiston was obliged to retrocess the Earl of Southesk, if he pleased, or, in his option, should prosecute their common affairs; and ordained him to exhibit the L.1000 sterling bond of the Duke of Hamilton for that effect.

This whole interlocutor was in favours of Eleiston, except only the last clause, anent producing the bond, which was occasioned by the Lords' inadvertency; for had they considered Eleiston's oath, they would have found that he declared the bond was not in his hands, as also *quomodo desiit possidere*, viz. In 1656, Thomas Dalmahoy having a pursuit before the Chancery Court of England, these writs, and particularly that bond, was by commission called for, and sent up, and never returned.

Whereupon Eleiston gave in a bill; the Lords were ashamed to retract their sentence, but superseded execution till the 1st of June, 1677, betwixt and which Eleiston might use his endeavours to recover that bond, and said they used this only to be a spur to make him serious in the getting it back; and for his encouragement, the Lords granted to give him a letter recommendatory to the Chancellor of England, head of that Court, to further the search of it, as they would expect the like favour; subscribed by the President in name of the Lords, *In P. D. Vide supra, 22d February*, 1671, No. 139.

The crampet of the recommendatory letter was this: "And by complying with this our just desire, your Lordship may expect a good correspondence in the like

cases with us, as is usual between eminent judicatories, that we may promote his Majesty's service, and give a testimony that we * * * * * * * * * * * * * * * * *." *Vide infra*, No. 574, *Dalmahoy*, [*June*, 1677.]

Advocates' MS, No. 507, folio 265.

1676. *November.*

ABOUT this time it was inquired, where a liferentrix and a minor are both convened anent the reduction of an heritable right, and the minor propones upon the maxim, *quod non teneatur placitare*, if the liferentrix may be compelled to answer? One would think not, *ob contingentiam causæ*, which cannot be divided. So teacheth Craig, *libro 2 feud: Dieg:* 12, page 220, confirmed there in the margin, from *Regiam Majestat.* and the Roman law; and Dury, 25th November, 1624, *Hamilton*; vide *Legem* 10 *in princ. D. Quemadmodum Servitutes amittuntur.* Yet they affirm the Lords found she should answer; which seems hard, for she will recur on the warrandice, and so the minor will be put consequently to answer and debate.

Advocates' MS. No. 508, § 1, *folio* 266.

1676. *November.* ISOBEL GUTHRIE, and LINDSAY of Pitscandly, her Husband, *against* ——————

ISOBEL GUTHRIE, sister to the Laird of Guthrie, and Lindsay of Pitscandly, her husband, for his interest, pursuing a special declarator of the escheat single of the last Laird of Guthrie, and pretending sundry leases of lands in Ireland fell under the same; it was alleged they did not, because they being tacks set for 59 years' duration, they behoved to be at least reputed of the nature of liferent tacks, which, by the act of Parliament, 1617, fall not under single escheat, but are only carried by the liferent escheat. For evincing whereof, it was alleged that a 19 years' tack (which is far short of a 59 years' lease) is in common estimation equivalent to a liferent tack *quoad* the value, if one were to buy them; and that they ought to be so reputed as not to fall under a single escheat, may be urged from Stair's system, *Tit.* 13, *No.* 4, *in fine, pagina mihi* 170; and Hope's Collection of Practicks, *titulo* Hornings and Escheats, pages 192 and 198. They talk of an old decision about this, *The Earl of Louthian, contra* ——————

There was another defence against this special declarator, viz. that thir leases could not fall under a Scotch outlawry and denunciation, they lying in Ireland, an independent kingdom, and ruled by different laws. But see more of thir two defences, *infra*, No. and in the informations. *Vide infra hoc eodem numero*, § 12.

Advocates' MS. No. 508, § 2, *folio* 266.

1676. *November.* ANENT NON-ENTRY OF BLENCH LANDS.

Quæritur, If Blench Lands fall so in non-entry, as, after decreet of declarator, the superior or his donatar will get the full maills and duties. He has right to them after declarator in all other holdings, but the *ratio dubitandi* in blench is because they bear a *reddendo, pro omni alio onere*; yet that cannot be a convincing reason, because notwithstanding thereof, their liferent falls, they pay cess, and bear burden, &c.

Advocates' MS. No. 508, § 3, *folio* 266.

1676. *November.* ANENT THE EXCEPTION OF HOMOLOGATION.

THE Lords have oft laid weight upon this exception,—You cannot be heard, because you have homologated my right by such and such illative and consequential deeds. See Stair's System, Tit. 10. of Conventional Obligations, § 11, folio 101. See the case between Sir Andrew Ramsay, and Mr David Thoirs. See 15th *June*, 1678, *Louthians*. Yet now they require that the deeds of homologation be very express and positive ratifications, free from all error or mistake before they make them bind. As for instance, Seius has an undoubted preferable right to the lands of ; Titius has a base infeftment out of the same lands; Seius not considering the validity or invalidity of the two rights, if in a competition, he pays an year's annualrent to Titius, who has the base infeftment, this acknowledgment and payment will not hinder Seius, being better informed, to reduce that base infeftment, and totally seclude it; only he will never be heard to repeat what annualrents he paid; for *bona fide solutum nequit condici, et suberat causa quædam. Vide supra*, February, 1673, No. 385. [Sir James Ramsay *against* Robertsone.] Yet a wife or a minor ratifying deeds done by them in minority, or when clad with husbands, are firmly bound thereby. See my Index of Dury's Practicks, *verbo Minors, numero* 62, *pen.* July, 1630, *Johnston*; and 11th January, 1639, which last citation I cannot find. *Vide infra*, June, 1677, No. 581. [*Dicksone* against *Short.*] *Advocates' MS. No.* 508. § 4, *folio* 266.

1676. *November.* ANENT THE WRITERS OF DEEDS.

THOUGH any designation in a writ satisfies the words of the act of Parliament in 1579, in case of improbation, yet the Lords have now ordained witnesses and writers, to be more specially designed than by that general and wide appellation of being called writers in Edinburgh. *Vide supra*, No. 319, at the 7th of February, 1672, Kettleston and Kirkhill.

Advocates' MS. No. 508, § 5, *folio* 266.

1676. *November.* ANENT CONFIRMATION OF BASE RIGHTS.

QUÆRITUR, If the confirmation of a base right stops ward? That it stops forefaulture and recognition, none doubt. Distinguish, 1*mo*, whether before the act of Parliament, 1606, or after. 2*do*, If the confirmation be by a subject superior, or by the King. If by a private superior, or before 1606, then it does stop ward; otherwise not. *Vide infra*, 6th July, 1677, No. 590, [Grant *against* M'Keinzie.]

Advocates' MS. No. 508, § 6, *folio* 26.

1676. *November.* ANENT SEASINES ON PRECEPTS FORTH OF THE CHANCELLARY.

IN precepts forth of the Chancellary, for infefting whether upon retours, or on the mediate superior's disobedience, there is a clause, *presentibus post proximum terminum minime valituris.* Notwithstanding whereof, a notary gives seasine after the year is past. I think the seasine will be null, *ope exceptionis*, because it is given without a warrant. Hope, in his lesser tract and Compend. cap. 70, Of Signatures, No. 12, seems to insinuate the reason why they are so abridged, because the sheriff must be answerable for the respond contained in these precepts. Besides there is *commodum curiæ*, in the renewing. See him also, cap. 3, Of Wards, &c. No. 16.

Advocates' MS. No. 508, § 7, *folio* 266.

1676. *November.* ANENT WAKENING OF PROCESSES.

WHERE a defender in a process depending dies, you cannot raise a wakening of that same process against his heir, (for wakenings are only *inter easdem personas*, where it has slept more than a year,) though it may be said that *hæres et defunctus* are *una et eadem persona, fictione juris;* but a summons of transferring must be raised of that process, or else a new pursuit against the heir; see Craigie's Collection, *verbo* Wakenings, folio 129; where he cites Dury, 18th December, 1629. A wakening of an improbation must be likewise raised, and executed at the King's Advocate's instance as a party pursuer, else it will be null. But *quæritur*, where a declarator is raised by a defender to meet an improbation pursued against him, (being of the nature of a reconvention,) if it must be likewise executed against the advocate.

Advocates' MS. No. 508, § 8, *folio* 266.

1676. *November.* ANENT REDUCTIONS.

IN the reduction of a decreet of an inferior judge, or of the Lords themselves, no certification will pass against the libel, executions, and minutes of process, (which are not presumed to be in the defender's own hands,) unless in the reduction the pursuer hath called the clerks of the court; only, this must be proponed as a *No process, in initio litis.* And if it be omitted, then a diligence or incident will be granted to the defender, against the clerk of that court to produce them.

Advocates' MS. No. 508, § 9, *folio* 266.

1676. *November.* LADY KIRKNESS *against* ———

WHERE a defender in an improbation produces an older right than the pursuer's title, in that case the defender needs not suffer the pursuer to get a certification *contra non producta*, because I will debate immediately why I am obliged to produce no more, and that the production made will exclude you; as was found in the case of Marshall's improbation against his vassals, where their rights proceeded and flowed from the Earl's father, and not from his brother, since the right whereupon he pursued his improbation was as assignee constituted to a comprising only led and deduced against his brother the last earl. Yet there is one case where even by a later right, I will force them to produce older rights, viz. where the pursuer is superior, (as Marshall was to some of the defenders,) for then he has right to call for their writs, to see their holding, and if they be under irritant resolutive clauses. *Vide supra*, No. 400, June, 1673, Abotshall *against* F. Kinloch.

Advocates' MS. No. 508, § 10, *folio* 266.

1676. *November.* LADY KIRKNESS *against* ———

WHERE reduction is raised of a comprising that is assigned; if seasine has followed on the comprising, either in the person of the cedent or assignee, and the author disponer be not called, then no process will be sustained in the reduction till he be called; (only some Lords are so lax as to allow him to be called *cum processu*, and grant an act and warrant for it:) but if it be only yet a personal right of a comprising that is assigned, and no infeftment yet taken on it, then the author needs not to be cited. A defender in a reduction is obliged to produce no writs that he condescends to be *in publica custodia*, viz. the books of session, nor any save those that are particularly called for, or such against which there is a special reason libelled.

Thir two last were found in the improbation pursued by the *Lady Kirkness, relict of Mr Patrick Oliphant, Advocate, against sundry Creditors.*

Advocates' MS. No. 508, § 11 *folio* 266.

1676. *November.* ANENT HERITABLE BONDS.

THEY say the Lords inclined to find that the assigning of an heritable bond made it moveable, like to a charge of horning or a requisition, and that Stairs has something of it in his System, tit. . Of Real Rights, *in principio:* but I think it must only be a mistake; though, by the act of Parliament in 1617, the assigning of a liferent tack makes it moveable, and to fall under single escheat. *Vide supra, hoc eodem numero,* § 2.

In the case betwixt Doctor Craig and Riccarton, they say, the Lords found bonds bearing clause of infeftment, though no infeftment actually followed thereon, belonged to the heir of conquest; and yet it would seem more agreeable to law, that they should fall to the heir of line, as moveable heirship, tacks, reversions, &c. do. But they answer, that only such real rights fall to the heir of line whereupon infeftment cannot follow; but this decision is dubious. See Stair's System, tit. . *Of Heirs,* where he speaks of conquest. *Vide infra,* No. 526, about the three sisters called Mitchelsones.

Advocates' MS. No. 508, § 12, *folio* 267.

1676. *November* 24. ——— *against* WILLIAM WEIR.

THE Lords this day reduced two decreets of adjudication, &c. obtained by Mr William Weir, at least assigned to him against Mr Edward Ruthven, son to the Lord Forrester, and, by his mother, apparent heir to the Earl of Bramford. The reasons were, 1*mo,* Because the heirs of line were not first discussed. 2*do,* The decreet was extracted after an intimated stop untaken off. *Vide supra,* June, 1676, Tenants of Bathgate, No. 479.

In this action, Mr William Weir was much frighted by a rumour, as if the Lords had designed to turn him out of his employment as an advocate *cum nota infamiæ,* and to make him an example; because, it was alleged, he had taken an assignation to it while it was a depending plea, contrary to the act of Parliament; *vide supra,* No. 482, *Eleiston,* in June, 1676: but he affirmed to me, it was decerned before he took assignation. However, there was nothing of it; and the Lords contented themselves with the reprimand to Wauchop, the macer, for the like deed at the same time. See the story of it in my Remarks of the occurrences in Session, on the 17th of November, 1676.

Advocates' MS. No. 509, *folio* 267.

1676. *September,* and *November* 30. LORD HALTON *against* The TOWN of DUNDEE.

September.—MY Lord Halton, treasurer-depute, as coming in the place of the late Earl of Dundee, by the gift of *ultimus hæres,* obtained a decreet at Secret

Council against the town of Dundee, finding, that as Constable of Dundee, he had the haill criminal jurisdiction within that burgh privatively, and the civil *cumulativé;* and thereon has expede a signature, and took infeftment about this time, in that his jurisdiction, at the Market-cross of Dundee. This insignificates their privileges as a burgh royal.*

They have raised a declarator before the Session against Halton; but as it is now packed, they can scarce expect ordinary justice there, and may well fortify his right by a decreet *in foro contentioso*, which even the subsequent Lords will be tender to reverse: so it were more advisable that *res* be left *integræ in statu quo*, till an equal hearing can be got; for it seems uncontroverted, that he arrogates and assumes more than ever Scrimgeor of Dudhope had, who were men inferior to none in vanity and pride; for their power was only to keep the king's peace, and guard the town of Dundee during the time of a fair, during which there was a great resort and confluence of strangers, and much bargaining and drinking, and so a probable fear quarrels might ensue; and this is the only reason for which I find constables were ordained in burgh towns. (A German has writ *De jure constabularii.*) Our burghs of old were so inconsiderable they needed this auxiliary assistance: as Kennedie of Carmucks was Constable of Aberdeen, and Erskin of Din was Constable of Montrose; and for their pains in guarding the town during the time of their fairs, they had some obventions and casualties and fines. Hence, I find by the 60th and 61st acts of the Parliament 1456, complaints were given in against the constables of castles as a grievance, in exacting stresses of the subjects that came to the fairs with their craims, and which oppression is forbidden till the Parliament consider if their infeftments bear them to these exactions or not. And to prove that the constable's power was not universal all the year, but only at set particular times, the jurisdiction of the High Constable, the Earl of Erroll, is a convincing argument thereof, for his power was only during the sitting of the Parliament in that town where it held, for guarding the King, nobility, and members of Parliament, and his old writs bear four miles about. See the Report in 1631, sent to the King by some he had commissionated for that effect, containing an account of the High Constable's privileges.

Quæritur—If the constable of the castle of Edinburgh has any jurisdiction within the town during the time of their fairs?

Advocates' MS. No. 495, *folio* 259.

Nov. 30.—THIS day the town of Dundee was convened by my Lord Halton before the Secret Council, for judging a riot, which only belonged to him, and refusing to keep prisoners for him, &c. conform to the decreet he had got against them. *Vide supra*, Sept. 1676, No. 495. He got their provost and bailies imprisoned in the tolbooth of Edinburgh, and fined the provost in 4000 merks, and each of the bailies in 3000 merks; and the town of Dundee ordained to find caution of lawburrows under the pain of 20,000 merks, for Halton and his servants' security at the hands of all the inhabitants of Dundee. Which was thought very strange and hard to bind, for the humours of people, who might in a pique to the magistrates cause them incur the failyie, and it wants an ordinary style. This caused great outcry.

Advocates' MS. No. 511, *folio* 267.

* The least that can be granted them as a burgh-royal, is a baron's power,—*Mixtum imperium ad vindicandam et explicandam suam jurisdictionem sine quo subsistere nequit; L.* 2, *D. de Jurisdictione.*

[See the subsequent parts of the report of this case, Dict. p. 16679 and 10274.]

1676. *December* 7. The Towns of Glasgow and Dumbarton *against* Sir John Shaw of Greenock and Others.

The Lords this day advised the declarator pursued by the towns of Glasgow and Dumbarton against Sir John Shaw of Greenock, and other neighbouring gentlemen, and sustained it thus,—That none but royal burghs had power to import wine, brandy, salt, and other staple commodities, mentioned in the act of Parliament in 1672; and repelled the defence founded on that act of Parliament, as to the salt and brandies not being included therein; and as if the burghs of regality and barony had liberty to import salt, because it conduces for the manufactory of fishes, and curing them; and found the importer incurred not the confiscation of his moveables, but only the thing imported was confiscated: and, within their own bounds, gave them power of seizure; and, elsewhere, gave them liberty to pursue the forefaulture of the goods, though they be sold.

Quærebatur—If the freeman of one burgh royal had liberty to trade in another, for then he might palliate unfreemen's goods. See King David's charter to the burghs of Scotland, in 1364. *Vide supra*, January, 1670, M. Mowat *against* Town of Lithgow, No. 106.

Advocates' MS. No. 515, *folio* 267.

1676. *December 9th.* Arthur Hutton *against* Arthur Hamilton.

Arthur Hutton, burgess of Hamilton, pursues Mr Arthur Hamilton for 1000 merks, contained in a bond, wherein his father was cautioner. His defence was *exceptio litiscontestatæ;* in so far as the defender's father being charged on that bond, he had suspended upon this reason, that the debt was discharged and innovated by a posterior transaction and agreement between the pursuer and the principal debtor, whereby he had renounced the cautioners, and taken him solely to the principal: and which reason being admitted as relevant, a day was assigned for proving it, and an act of litiscontestation extracted thereon; but, *medio tempore*, the suspender dying, the affair lies over, and cannot be otherwise insisted on now but by transferring that act.

And so my Lord Halton found the act of litiscontestation in that suspension behoved to be the rule transferred and insisted in, unless we reduced it, or the agreement between the principal debtor and us, upon the irritancy and failyie.

Advocates' MS. No. 516, *folio* 268.

I.—Anent Persons at the Horn.

The producing of a horning will not debar a witness from deponing, especially if it be only a civil rebellion; because he comes not voluntarily, but by command of a judge, and is not to depone for any advantage to himself. But what if the horning be for a criminal cause? *Vel est crimen quod infamat vel non.* A pursuer *non habet persona standi in judicio,* if he be at the horn; but it must be objected. This found by the Lords on the 21st *June,* 1610, *Scot* and *Scot.* But as to defenders, it is most hard to hinder them *a se defendendo* by horning: as the Lords found in July, 1676; see it *alibi. Vide supra,* it mentioned, No. 501, § 18. What if a horning of King Charles the First's time be produced against a man to debar him *ab agendo?* You will not get caption on it, because *mortuo mandatore expirat mandatum.*

II.—Anent the Expiry of Procuratories of Resignation.

A man dispones lands, and grants a procuratory for resigning; the receiver dies, his son is served heir; *Quæritur,* If resignation can be made on the procuratory granted to his father, since *hæres est una et eadem persona in jure cum defuncto,* and the granter is living, and so *per mandatis mortem non expirat,* and that the procuratory bears to him, his heirs and assignees. It seems *tutius* to pursue the granter to renew the procuratory.

III.—Anent Legatars.

If a person be legating, and resolves to prefer one legatar to another, and to bring him in with preference next his creditors, he has no more ado but to deliver *rem legatam,* before his death, or make it *speciale legatum* out of such debts, which will affect these sums, or appoint, *per enixam suæ voluntatis testationem,* it be paid *primo loco,* before the rest.

IV.—Anent a Liferentrix's Right to Coal.

A liferentrix of lands will have right to a going coal, *quoad usum necessarium tantum;* see Craig, Feudorum, p. 189. The superior wardator has the same power; see Craig, p. 288, and my Lord Craigie's Collection, folio 180. But what if the fiar omit to work the coal? She may raise a declarator to hear and see him decerned to work it, or that the Lords may liquidate and modify a sum yearly in place of her damage; or else that she may have liberty to work it for her own use, defraying always the expense off the first end of the price, and she being countable for the superplus, if any be, to the fiar.

V.—Anent Confirmation of Executors.

The Lords, *in anno* 1662, in the case of one Bell, in Glasgow, found *jus sanguinis,* in an executor transmitted without confirmation, which was never so decided formerly. See it in Stair's Decisions, *ordine temporis, apud me.*

VI.—Anent Payment in Fungibles.

A tenant suspends against his master's assignee, and against a creditor of his master arresting the farms in his hands, on double poinding. After debate, the assignee is preferred. The tenant offers to pay him *ipsa corpora*, the bolls for victual; being *res fungibilis, tota species debetur, et una defungitur vice alterius;* and as to intrinsic value, one boll is as good as another commonly.

Answered,—He is not obliged to take the victual, but he must have the fiars then, because it sold at double rate. The tenant says, I could not keep the victual, it might have spoiled. I could not give it to you, because your right was *sub judice*, and I acted *tanquam bonus paterfamilias fecisset in re sua.*

Replied,—Offers to prove you made use of it, and got such and such prices for it, wherein he was but a factor *et negotiorum gestor*, and so must be liable to me for the price you received.

I think the reply relevant, the tenant being *in lucro captando*, and the creditor *in damno vitando.*

VII.—Anent Poinding of Tenants' Corn.

To poind tenants' corns proves oft times disadvantageous to the creditor poinder, for he can readily get no other to apprise them on the ground of the land, or even at the Market-cross, but other tenants or country people, who fearing it may be their own case, hold with them of their own rank, and will commonly swear there are 20 bolls of corn in a stack where there are scarce 12. It is surest for a master, where his tenant falls weak, to intromit with all, and be countable for the superplus.

VIII.—1676. *December.*—William Borthwick *against* ————

A person employs William Borthwick, the chirurgeon, to cure another; he pursues him for the cure; he depones he did bid him do it, but when it was half done, he declared he would not be bound for it, since the man had disobliged him, and so craved to be assoilyied. I think this was not *renuntiatio tempestiva et re integra*, as must be in all mandates and societies, and it is such a thing as cannot be divided, and the surgeon *susceptum perficere munus tenetur*, both for his own credit and the person's health.

IX.—Anent Witnesses disowning their Subscriptions.

If witnesses, either to a subscription, or in any legal execution, or led for probation on a process, shall either openly at table, or before witnesses, or by a written declaration under their hand, disown their subscriptions, or their being received, used, or desired to be witnesses to that execution, or shall tell what they are to say, it is the relevant objection against them, called in law *proditio testimonii*, and will cast them as suspect, if it be known; and therefore their declaration must not be made use of in public, but they may be examined on the matter without relation thereto.

Advocates' MS. No. 517, *folio* 268.

1676. *December* 12, *&c.* JOHN MARSHALL *against* CHRISTIAN HOLMES.

CHRISTIAN HOLMES having obtained a decreet before Sir John Harper, as Sheriff-depute of Lanrick, against John Marshall, for the liferent of 300 merks of her husband's intromitted with by him, the whole conquest being provided to her in liferent: (*Item*, The diets and acts of the process were confounded; the probation not renounced; the term not circumduced; the party not cited to hear sentence. *Vide infra*, 8th November, 1677, Barbara Grant, No. 648.) Marshall raises suspension and reduction on this reason, that the decreet was pronounced *spreto mandato judicis superioris*, there being an advocation ready to produce, on notice whereof the judge precipitated and decerned, but it was written after. This being taken to the Inner-House by my Lord Halton, they repelled that part of the reason, viz. that the advocation was produced, albeit after pronouncing of sentence, yet before the same was redacted *in scriptis* by the clerk, since the judge, after he had pronounced sentence, was *functus officio;* but find the other member of the reason relevant, viz. that before production of the advocation, the judge had only pronounced these words, *Decerns*, and after the advocation was pronounced, he did specify the terms and qualities of his sentence, and did dictate the same to the clerk, in regard the sheriff-depute ought to have done nothing in the matter after the advocation was presented; and find the said reason instructed by the instrument produced under the hand of the clerk of Court, and another notary. But the Lords, *ex gratia*, in respect of the dubiuosness that might be in the case, turn the decreet into a libel. See Dury about a case like this, 8th March, 1634, Thorneton. See Laufrancus Balbus, *Decisione* 357.

Thereafter we proponed our defence against her libel, (though Holmes' procurators alleged we were only reponed *in statu quo* at the time of the advocation, but this was a mistake,) viz. that the said relict, pursuer, had got her third part of the stock and fee of the haill inventory of the testament confirmed; and so having betaken herself to that legal division, she could not recur now to seek likewise the liferent of the haill, these being incompatible, to be both liferenter and fiar as to one and the same inventory or sum.

ANSWERED,—*Non relevat*, unless we say, Accepted in satisfaction of all she could claim by her matrimonial provision.

This being taken by Newton to interlocutor, the Lords found, on the 2d of February, 1677, the allegeance bearing that the pursuer has accepted and taken a third of the moveables, relevant to seclude her from any liferent of the moveables or moveable sums, but that the same did not prejudge her as to her liferent of any sums that are heritable *quoad fiscum et relictam*.

Whereupon we offered us to prove, that she had gotten a third even of the heritable sums in the testament, and so could crave no liferent of the remanent; since, by that same rational ground in law, whereby the Lords found she had secluded herself of the liferent of the moveables, in regard she had taken the third of them in stock and property, even so here, by getting the third part of the principal heritable sums she has passed from the liferent of the other two parts that fall to the children; and so, by compensation of the third of the fee with the liferent of the haill, her liferent is extinguished and satisfied.

The Lords found this our condescendence relevant to seclude her totally, only the question arose about the manner of proving it. The Lords would not admit it other-

wise probable than *scripto vel juramento*, to take away her written obligement in her contract of marriage; but we prevailed this far, that she should be ordained to depone in presence of the debtors condescended upon by us, who paid in to her the third part of the heritable sums they were owing; but declared, that if Marshall, the defender, had them not ready to confront with her at the day assigned to her for deponing, (to which purpose they allowed him an act for citing them,) their not compearing should be no hinderance to her from deponing. So that, when the day came, and she offered to depone, we could not get it stopt on the production of a diligence executed against them, and in seeking a farther diligence by caption; because the Lords supposed it was *animo protelandi*, and that he kept them back, and might have had that influence and moyen to have brought them in upon the first citation. See the informations.

On the 10th of November, 1677, her oath being advised, the Lords found it did not prove the defence that she had got the full third; and therefore decerned, but declared, what she got more of the moveables than is proven before the Sheriff in that decreet, they will allow them to compense *pro tanto;* for she affirmed, in her oath, these sums were given her for alimenting the bairns, and not in satisfaction of the conquest.

Advocates' MS. No. 518, *folio* 269.

1676. *December* 13. FRANCIS MONTGOMERY *against* LORD MELVILLE.

THIS day was Mr Francis Montgomery, brother to Eglinton, and my Lord Melville's interlocutor about his *jus mariti*, and that the assignation was sufficient to purge vitious intromission, and that he was liable in *quantum locupletior factus erat*, &c. The case must be inquired into.

Advocates' MS. No. 521, *folio* 270.

1676. *December* 13. DR HALIBURTON *against* LORD BALMERINO.

DR HALIBURTON, one of the creditors of the last Lord Coupar, had a favourable interlocutor against the Lord Balmerino, who had got that estate. The Lords found, where an apparent heir, (such as Balmerino was to Coupar,) caused comprise the predecessor's estate for a debt owing by the said apparent heir himself before his interest exists by his predecessor's decease, it shall infer *gestionem pro hærede*, (as in the Earl of Nithsdale and Glendyning's case was determined by act of sederunt in 1662;) if the apparent heir enter in possession by that comprising, either by communicating it to others, who bruik by it and have no other better right, or by uplifting the maills and duties, or by entering vassals. And Haliburton was very clear he could fasten some of thir qualifications on Balmerino. But their re-

fuge was that he was insolvent, denuded of all, and *in familia* with his son. See the information of it. *Vide supra*, No. 453, in December, 1675, Kello.

Advocates' MS. No. 522, folio 270.

1676. *June, and December* 20. WILLIAM WRIGHT *against* SHEILL.

June.—WILLIAM WRIGHT in Portsburgh, having charged one Sheill upon a decreet, he suspends upon a reason of compensation.

ANSWERED,—*Primo*, That the ground of the compensation being against his cedent, it could not meet him, the assignee. *Secundo*, It could not be obtruded to him, because he had no right to the sums with which he craved to compense, being only apparent heir to the creditor in these bonds. *Tertio*, Since comprising and infeftment had followed on his decreet, compensation could not meet it.

REPLIED to the first, That compensation in law is equivalent to a discharge, and so must operate against assignees, as is constantly decided by the Lords; especially in thir two cases:—Where the ground of the compensation is liquid, and before the assignation; and, *secundo*, If the assignation be not for an onerous cause, even suppose it be after the same. See this prosecuted at large in other papers beside me, out of Dynus *ad Regulas Juris Canonici*, of Schotanus *in Examine Juridico*, and out of Durie's Practiques. To the second, REPLIED,—Payment on a discharge may be proponed by one not having a formal established right, but compensation is of the nature of payment. But, *secundo*, he has confirmed this sum. As to the third, Compensation upon comprising does not hinder but compensation may be proponed against the same upon a personal debt, for the law does not precisely require the two debts compensed one with another to be wholly of one kind; as was lately decided in the case of Blacktoun Forbes against the Laird of Leyes. Yet compensation being only equivalent to a discharge, a simple discharge is found to be the *habilis modus* to annul some real rights that require registrate renunciations, such as wadsets, &c.* But, *secundo*, the infeftment on the comprising is null, being granted by the Bishop of Edinburgh; whereas the true superiors of the apprised tenement lying in Leith, are the ministers and kirk-session of Leith, as preceptors of St Antonie's Chapel, of which that house holds, and of whom Sir Jo. Young of Leny (who compears for his interest,) has taken his infeftment and right. But, *3tio*, Leny offers to prove that Wright's comprising is satisfied by his intromission within the years of the legal. This point is reserved to him to prove as accords.

ANSWERED,—The infeftment cannot be annulled by way of exception. *Secundo*, Lennie's comprising cannot be respected, because offers to prove, by his own oath, he is paid, and that he now retains it to the behoof of the common debtor.

The term is circumduced and extracted against Sir John, for not compearing, and deponing anent the trust.

* See the contrary of this in Stair's Practiques, tit. 11, Solution of Obligations, § 6; and in his Decisions, *29th November*, 1662, *Ogilby and Dumbar*.

Then the charger ANSWERED to the reason of compensation, that the same was not receivable now, because competent and omitted in the first instance against his decreet; and so not being proponed there, by the 141st act in 1592, it could not be received now in the suspension.

REPLIED,—*Primo*, The said act of Parliament was in manifest and notour desuetude, and the Lords, in a constant tract, determined in the contrary. *Secundo*, It made nothing against the suspender, but might admit a very favourable and rational interpretation, viz. of decreets wherein there is compearance, that, against such, compensation shall not be admitted in the second instance; but where the decreet was given in absence, *parte non comparente*, and no defence proponed at all, but merely for contumacy, it were absurd to seclude the allegeance of compensation against such decreets, or to wrest and extend the meaning of the act of Parliament to such a case. And we had a clear instance that compensation was receivable, notwithstanding of a decreet in absence, in the example of registrate bonds; the registration is a decreet, not merely in absence, but of consent of both parties, and so in a manner *in foro*; and yet no lawyer ever pretended that compensation could not be objected against a registrate bond.

DUPLIED,—The act of Parliament spoke in indefinite universal terms of decreets and sentences, and made no distinction whether they were upon compearance or no; *et ubi lex non distinguit, &c. et indefinita locutio æquipollet universali*; and that the case of registration was not alike, because there was no previous citation of the debtor to that, as is used in other decreets. Likeas, the Lords have decided conform to the said act of Parliament, and refused compensation in the second instance: as Dury observes, 1st December, 1662, Viscount of Stormont *contra* Mr Harry Cheap's man, and the citations of laws and authors in margin there; yet he confesses this was the first time he had seen the Lords follow that act of Parliament, which was not *in inviridi observantia*. Halton ordained practiques to be adduced on both sides, but he was over scrupulous and tender of that act of Parliament, (I wish he had been so in all:) for it seems just that compensation may still be received against a decreet where the decreet is in absence; for though it was then competent, yet nothing else was proposed to evince *animum dolosum*, in keeping up the exception of compensation.

Yet see compensation refused against a decreet in absence;—Stairs, *27th January*, 1662, *Stevinson and Thomson; item, 5th February*, 1678, *Logan and Couts*, it is page 15.

Vide supra, No. 190. See a little of this concern, January, 1680.

Advocates' MS. No. 484, *folio* 250.

1676. *December* 20.—On the 20th of December, 1676, this being reported by Halton, the Lords repelled the allegeance of compensation, because not proponed *in prima instantia* against the first decreet, though it was only in absence; unless Lenie or Sheills will reduce the said decreet upon some nullity or informality in the executions of the summons whereupon the said decreet in absence proceeded; or that the said decreet be turned in a libel, for then they will admit the compensation.

Advocates' MS. No. 484, *margin, folio* 250.

YULE VACANCY.

1677. *January* 3. MITCHELSONES *against* MITCHELSONE.

THE three sisters, Mitchelsones, daughters to umquhile Archibald Mitchelsone, gave in a bill to the Lords this day, representing that where Matthew Mitchelsone, their father's immediate younger brother, did conquest certain tenements, and though they were his undoubted heirs of conquest, yet William Mitchelsone, their father's third brother, and immediate younger to the said Matthew, had served himself, before the bailies of Kirkcaldy, as heir of line to him; and they having taken out a brief, and the magistrates refusing to serve them in heirs of conquest to the same lands, therefore craved the Lords would either ordain the magistrates to do it, or the Sheriff of Fife, as the next judge ordinary, where the immediate is contumacious.

The Lords would give it no answer, but verbally to the clerk, that as apparent heirs of conquest they would sustain a reduction of the heir of line's service, the lands being proven to be conquest; or else upon a new requisition of the magistrates, and instruments taken of their refusal, they would, on sight thereof, grant advocation of the brief from the bailies upon their iniquity to the macers.

Which last method being followed, and the 2d of March the day appointed for serving before the macers, Mr A. Anderson compeared for the heir of line, and alleged the service could not proceed, because one was already served and infeft as heir.

ANSWERED,—That could be no impediment, for we opponed the Lords' ordinance, and the macers' commission under the quarter seal; and the two services were not *ad idem*, the one being of an heir of line by mistake, and the other as heirs of conquest; where also it was made appear from Stair's System, *titulo* Of Heirs, §, what he got from his father was conquest, in regard he was not the eldest son.

The macers proceeded to serve, and the inquest served *affirmative*; admitting the other's protestation, as accords.

This was a singular case; for the more ordinary objection against service is *exceptio bastardiæ*. *Vide supra*, No. 508, *in fine*, [November, 1676.]

Advocates' MS. No. 526, *folio* 271.

1677. *January* 3. SIR WILLIAM BENNET of Grubet, *against* JAMES PEUTHERER.

SIR WILLIAM BENNET of Grubet, convenes James Peutherer and his wife, upon the *edictum prætoris*, "*Nautæ, caupones, stabularii*," *ut recepta restituant*, to restore him a cloak he had laid in there, and which, by the merchant's account,

produced, stood him L63, Scots; she depones she received it, and laid it in a close room, and afterwards gave it out to her servant to be given back.

The Lords advising this oath, found the husband liable; but in regard it was an used cloak, they modified the value to 60 merks.

Advocates' MS. No. 527, folio 271.

1677. *January 4.* The EARL OF GLENCAIRNE *against* JOHN BRISBANE.

THE Lords, in the cause of the Earl of Glencairne and John Brisbane, found, where a man pays the adequate price of land, and, *ex gratia et favore*, grants to a friend a reversion personal to him, and his heirs of his own body, but nowise to his assignees, that the reversion was not transmissable, and could not be affected, adjudged, nor apprised; and being for personal respects, could neither accresce to the creditors of him to whom it was granted, nor be communicated to them. *Vide* Dury, 24th March, 1630, Maxwell, and the other quotations there.

Advocates' MS. No. 528, § 1, folio 272.

1677. *January.* ANENT CAUTIO JUDICIO SISTI.

ONE becomes caution *judicio sisti*, to present a boy who is within ten years old, and that without a suspension. Thereafter he suspends. The cautioner being convened, offers to present him with a renunciation of the suspension. *Quæritur*, If this salves the failyie? I think it satisfies the obligement; especially since you could not have incarcerated him, not being *proximus pubertati*, which begins but at ten and a half, dividing the time with the doctors between infancy, ending at seven, and pupillarity beginning at fourteen, in two moieties.

Advocates' MS. No. 528, § 2, folio 272.

1677. *January.* ANENT TUTORS.

A MAN nominates his wife tutrix to his bairns, and in case either of her death or marriage, names another person; she refuses to accept, and renounces. *Quæritur*, This being *casus non cogitatus*, and not provided for by the father, if, on her renunciation, *fit locus tutori substituto*; like the two cases, *voluntatis et impotentiæ*, in vulgar substitutions of heirs. It is probable there will be room for a tutor-dative; yet so that if the tutor offer to accept, he *tanquam ex voluntate patris presumpta*, will be preferred to any other.

Advocates' MS. No. 528, § 3, folio 272.

1677. *January.* ANENT EXPENSES IN A CALUMNIOUS PURSUIT.

WHERE a party defender gets an absolvitor, and raises a pursuit before the Lords, to get him condemned in expenses *tanquam temere et calumniosé litigans*, it will not be sustained, unless the first decreet bear that the pursuit was calumnious: else he must lose that decreet, and of new debate the grounds of it, that he may make it appear to the judge, and persuade him that it was a calumnious pursuit. *Vide infra*, 11th July, 1677, No. 602.

Advocates' MS. No. 528, § 4, *folio* 272.

1677. *January.* ANENT REGISTRATION OF CONTRACTS.

THOUGH some of the parties consenters in a contract be dead, yet if the principal parties, subscribers, be living, it may be registrate (notwithstanding the death of the others) as to their interest; yea, if a party contract *nomine alieno et procuratorio*, if he die, yet if the party live to whose use and behoof it was, he may registrate it, if his name be mentioned in it, and the other be called only his trustee. A clause in a contract in favours of a third party, though not subscribing, may be acclaimed by him, and execution sought thereon. See Durie, 1625.

Advocates' MS. No. 528, § 5, *folio* 272.

1677. *January.* ANENT JUS RELICTÆ.

WHERE a husband dies before a term, such as Martinmas or Whitsunday, the relict ought not only to be entertained till the next term, but ought also then to have half a year's rent by advance for the subsequent term, to live upon; since she cannot feed on the air, or live perquire, her head bound to the heck, or take in trust; for it is a venture, and she may lose as much at her death, if she decease but one day before Whitsunday or Martinmas, and so the fiar will happen thereby to be a gainer.

Advocates' MS. No. 528, § 6, *folio* 272.

1677. *January.* ANENT PUBLIC DEBTS.

THE act of Parliament suspending all execution upon public debts, declares none shall be reputed such debts unless they were registrate and recorded in Humbie's book, as lent for the public use.

Advocates' MS. No. 528, § 7, *folio* 272.

1677. *January.* ANENT DEPREDATIONS BY HIGHLANDERS.

WHERE depredations are made by the Highlanders, (for whom the clans are caution,) if intimation be duly made at such and such places by a notary, and instruments, then Major Grant and the heads of the clans are bound to refund the damage; and his pension forth of the treasury, for keeping these countries peaceable, may be arrested for the same, though commonly pensions are not arrestable.

Advocates' MS. No. 528, § 8, *folio* 272.

1677. *January.* ANENT THE CALLING OF THE ROLL.

THE Lords at this time by their act renewed that part of the act of Parliament, and regulations about the calling of the roll, and what is not brought to an act or decreet to-day, that it may be marked and called to-morrow; and in case the pursuer insist not the second time, then to delete it; and not to be heard again, till it be of new enrolled, and come in behind all that is before it in the book of enrolment. By which rule, if observed, they sweep clean before them. But it was made for the weak Lords; because many pursuers shunned to insist before them. *Vide* this renewed 1st November, 1677, No. 644.

Advocates' MS. No. 529, *folio* 272.

1677. *January.* ANENT THE ADVOCATES' ROOM.

SIR ANDREW BIRNY, and some of the conformist advocates, having made an act to seclude noblemen, and all other persons whatsoever, from entering into the Advocates' room and walk, much umbrage and discontent was taken thereat; as I have marked in my session occurrents, 2d January, 1677. The reason of this act was because they drew up only with the late entered Advocates, and discountenanced the conformist ones; for which cause, the President, &c. caused make the said act for excluding them. The Earls of Dalhousie, Home, &c. with the Lord Forrester, came one day and required leave to enter; and the keeper refusing, they took instruments in the hands of two notaries they had brought with them. Whereon they gave in a complaint to the Secret Council, founded on their peerage, and that they had ever been in possession of it, and that their business might suffer else.

The Secret Council after some heat referred it to the session, who called the parties next day. Sir G. M'Keinzie alleged they were so crowded with throngs, that it was the lieges' interest not to come in and disturb those who were met there only to do their business, and that he had seen the Earl of Crawfurd kept at the door; and that during Sir G. Lockhart's own government, there was an act for seclusion of all but Advocates made. Sir G. ANSWERED, there was no such act in the books, nor could be shewn. M'K. REPLIED, it was a part of his arbitrary tyranny, if it was not recorded. This and some other harsh expressions Mr George Bannerman

resenting, attended Sir G. M'K. at twelve o'clock that day, and gave him a challenge. Whereof the President and some other Lords being informed, they put them both under arrest; and next day citing them before them, caused them find caution to keep the peace under the pain of 10,000 merks, and proffered them a bond to be subscribed for that effect. Which Mr G. B. refusing, was ordered to prison, but was only attended by a macer till six o'clock at night; at which time he engaged.

The Lords fell upon sundry models of the outer-house, to please the Lords and others: but it was to no purpose.

Advocates' MS. No. 530, folio 272.

1677. *January.* ANENT THE PRIVILEGES OF ADVOCATES.

BAILIE CHARTERIS about this time imprisoned Mr Thomas Baird in the Tolbooth of Edinburgh, whereupon a great complaint was made by the Advocates. See the story of it, and about the privileges of Advocates, and anent the town officers pointing a silver dish from George Stewart, Advocate, for not paying annuity, &c., in my manuscript containing the occurrences emerging in the session, page 4 *et seq.*

Advocates' MS. No. 531, folio 272.

1677. *January* 17. The COUNTESS DOWAGER of ERROL, *contra* The EARL of ERROL.

THE Lords having this day advised the point mentioned *supra*, in July, 1676, No. 492, § 5, whether, *in debito annuo*, the election should be made once for all, or *quotannis*; and the Lords found the Earl ought to choose either money or victual; and which of the alternatives he elected, it behoved to stand for the rule in all time coming, since it were very hard for the liferentrix that the fiar should give her money, when the victual sold at a high rate, and victual again when it was cheap. And assigned to him the 15th of February, betwixt and which the Earl should declare his option by a declaration under his hand to the clerk, to be inserted in the decreet; else they decerned for victual, the Countess electing that. The Earl elected victual.*

2do, In the other process betwixt them, whereby it was admitted to her probation that the mains of Essilmont paid victual, the Lords this day advising the depositions, found in respect of their unclearness, some deponing money, and some victual, the probation resolved in an equality, and therefore (as in *causis dubiis*) divided it into half money and half victual. See the information of it beside me.

The 3d process was the cognition anent the condition of the Tower of Essilmont,

* *Vide L. 5. in princ. ibique Gothofredum in notis, D. De Legatis, 1mo; L. 20, D. De optione legata.*

she being charged by the Earl to uphold it as liferentrix, it being ruinous before her entry; of which, *vide plura infra*, No.

Advocates' MS. No. 533, folio 273.

1677. *January* 24. THE KING'S FRIGATE *against* A SCOTS CAPER.

THIS day the case of the Tortoise ship was debated betwixt the King's frigate and a Scots caper: this ship being first discovered by the King's frigate, and so disenabled by its cannon that it could not have escaped,—in come other two Dutch ships to rescue and bring it off; the King's ship being engaged in discussing of them, Captain Ranken, commander of a Scots privateer, comes in upon its play, and seizes upon the Tortoise, and carries it away. The King's Advocate, &c. raise a declarator that the ship belonged to his Majesty's frigate, because it having chased away the other two ships, nothing could have hindered her from becoming master of the Tortoise, that lay exposed to mercy, unable to resist, unable to flee, unfit to sail.

Alleged for the Scots privateer, that such things are *primi occupantis;* that the case is already determined by the Emperor Justinian, *in* § 13, *Institutionibus de rerum divisione, et acquirendo rerum dominio,* in the parallel of a wild beast that one hath wounded so as it can hardly easily escape, and he is in prosecution of it, another nearer hand it than he first apprehends it:—Trebatius thought the first was *dominus:* but the law says it becomes *ejus qui ceperit, quia multa accidere possunt ut eum non capiat, multa inter calicem supremaque labia;* and the other is only guilty of incivility, and may be fined therefore, but the property is transmitted to the taker. Thus Plutarch, *Quæst. Grecanica* 29, tells, the Isle of Acanthos being deserted, was adjudged to the Chalcidians, who first entered it, and not to the Andrians, who first took symbolical possession by throwing in a dart; see *Vinnius ad dictum* § 13, *et ad parag.* 46 *Institution. dicto tit. de rerum divisione,* &c. Mr Alexander King, in his *tractatus consuetudinum navalium, Tit.* 4. *No. ultimo,* decides in favours of the taker. *Vide Ærodii Pandectas rerum judicatarum, tit. De acquirendo rerum dominio, cap.* 10. See Paulus Voet. *De Jure Militari, pag.* .

The Lords first before answer took trial, if the said ship was so embeciled that it could not have escaped the man of war.

1677. *February* 15,—The Lords having advised the debate on the 15th of February, 1677, preferred the Scots privateer to the King, to give a demonstration of their equity that they durst determine against the King. This was done *valde reclamante Præside,* for Sir James Stamfeild's sake.

Advocates' MS. No. 535, folio 273.

1677. *January* 25. CAPTAIN JOHN BROWN *against* WILLIAM NEWBERRIE.

CAPTAIN JOHN BROWN, in Leith, as assignee constituted by his brother, pursues William Newberrie, as he, who, for payment of L.413 Scots, had got an assig-

nation to debts of a triple value for his payment, to count and reckon for the superplus, before the Bailies of Leith.

The defence was, that the disposition was absolute, and he was not liable to count, &c.; which see in the informations. The Bailies, with advice of their assessors, having fully considered the defender's eiked defences, and replies made thereto, with the registrate bond granted by the pursuer's cedent to the defender, containing an assignation relative to the bond joined in one writ, and that the said assignation is granted on the special causes and considerations therein mentioned, viz. In regard and on the account the granter was then instantly to pass furth of the realm to foreign parts, and that it was reason the defender should be secured anent his better payment of the sums contained in the bond; and that the assignation was granted but prejudice of the personal obligement: therefore they repelled the eiked defence, and found the defender liable in the superplus of the sums assigned and intromitted with by him, more nor satisfies the sums contained in the bond granted to him; and ordain the defender to discharge the said bond, and to retrocess the pursuer to what of the cedent's money is not yet uplifted; and admit the pursuer's claim to his probation; and that notwithstanding of these general words in the narrative of the assignation, bearing for other weighty causes and good considerations, which are only a superfluity and redundancy of the common style of writing, unless the defender will condescend on other onerous causes beside the sum in the bond; and that by the particular causes of the assignation above mentioned, and the generality of the assignation to all the granter's means and estate, sufficiently clears that the true intention and design of both parties, was allenarly for securing the defender for payment of the sums contained in his bond; and the express consideration of the granter's going out of the country, manifests and demonstrates that what superplus should be intromitted with by the defender, was only as a factor and administrator for the pursuer's cedent during his absence, he being first paid.

Of this decreet, Newberrie having given in a bill of suspension before Craigie, and, upon the amand of a dollar, having obtained the Lords' answer, they repelled his reasons, and adhered to the Bailies' interlocutor, as most just.

Advocates' MS. No. 536, folio 273.

1677. *January.* JAMES JOHNSTON *against* JAMES SYME.

ON the occasion of James Johnston, writer to the signet, his action against James Syme, burgess of Hamilton, for payment of a debt owing by his good-sire, wherein we did his process, because Syme was only descended of a third son of the debtor, and so could not be his heir, (see many other defences in the information *apud me*,) we fell to discourse on this point of law, viz. Where a man assigns a debt to another, and gives warrandice from his own fact and deed, and there be a prior sentence absolvitor from that debt, we thought it would fall under the warrandice; but if the warrandice in the assignation be so qualified, that it is only from all former assignations or discharges, a sentence does not fall under the warrandice of fact and deed. See *Mangilius de Evictionibus, Quæstionibus* 14, 15, and 16.

Advocates' MS. No. 537, § 1, folio 273.

1677. *January.* ANENT DECREETS OF CONSTITUTION.

IT was questioned about this time, if I needed to have a previous decreet for constituting the debt against the heir, where I mind to lead an adjudication of his predecessor's lands, where the heir is already served and retoured, and has already acknowledged the debt. It was alleged, none of thir could be the ground of a summary charge against the heir, without a decreet. Yet the Lords leapt over this point of form, and sustained it as a sufficient ground of an adjudication, and ordained it to stand for a rule in all time coming.

Advocates' MS. No. 537, § 2, folio 273.

1677. *January.* ANENT THE CLERKS OF SESSION.

SOME of the Clerks of Session, or their servants, have, in the scrolls of decreets of adjudication, conform to the act in 1672, when the party exhibited not the writs, adjudged the haill lands, and a fifth part more; by an absurd inadvertency that a fifth part more is only due where such a quantity of lands is only adjudged as is effeiring to the debt owing.

Advocates' MS. No. 537, § 3, folio 274.

1677. *January.* ANENT DESTINATION OF LANDS.

AN heretrix of lands takes new infeftment to her husband and self in liferent, and to the bairns of the marriage, without saying in fee; and which failyieing, the one half to the husband's heirs, and the other half to the wife's heirs; *Quæritur*, there being a son of the marriage, if he be heir of the whole lands? I think he is, because it was only *error et omissio scriptoris.* There is *minus dictum, et plus cogitatum menteque retentum.*

Advocates' MS. No. 537, § 4, folio 274.

1677. *January.* LORD BAMFF *against* The LAIRD OF ROSA-SOLIS.

IN that intricate cause pursued this session by the Lord Bamff against the Laird of Rosa-Solis, the Lords laid little weight upon Bamff's letters to all and sundry, declaring that Where he had bought such a man's lands, and was to pay such a price, therefore, and on that reason, had subscribed blank bonds to that value, and declared he should be debtor to any whose names should be filled up in these blank bonds. He thereafter having acquired the gift of the liferent escheat of the seller of the lands, these bonds were found to fall under escheat, albeit he was bound by his let-

ter in manner foresaid; unless the creditors whose names were now filled up in the bonds, would prove their names were filled up therein before general declarator. See the act of sederunt anent blank bonds, made in 1666, mentioned in Sir George Lockhart's Compend of Durie's Practicks, *verbo* Bonds, *in ipso fine*, immediately before the word "Brughs." As to the insignificancy of holograph letters, see Durie, 14th February, 1627, Pyronon and Ramsay.

Advocates' MS. No. 538, § 1, *folio* 274.

II. By the law of England, the King can do no wrong; that is one of their maxims; and therefore he cannot be pursued in any court. But to put wrong out of his reverence, they do not allow him a power either to judge alone, or to execute the law alone, without his magistrates and judges, for he can neither give sentence nor imprison.

III. In England, he who is mute and stands silent, and neither pleads guilty nor not guilty, is pressed to death with weights, called, in their Norman jargon, *mort forte et dure*, and has no other water to drink but the gutter running by the Tower of London; and thus saves his estate to his posterity, if it be a crime that would have tainted the blood and forefaulted his lands. Which privilege of contumacy seems unreasonable. With us, traitors may be forefaulted in absence, yea, after their death, by two express acts of Parliament, the one in 1540, the other in 1669.

IV. A nobleman's daughter, in the custom of England, marrying a gentleman, retains her former rank and dignity; but loses it if she marries a nobleman, for then she takes place conform to his quality and degree; *tunc sequitur illius conditionem, radiisque splendet maritalibus:—Quæritur*, If it will be so in Scotland? See observes on this in my remarks *ad annum* 1670, on the act of regulations of the session. One of Duke William Hamilton's daughters being first married on the Lord Kilmawers, and now on the Laird of Robertland, by a special patent from his Majesty, (who is *omnis nobilitatis fons et honoris*,) retains the place due to her birth.

V. I heard Sir G. Lockhart affirm, that, by the law of England, tutors are not accountable for their intromission, but are like superiors in a ward; they make the haill fruits their own, giving the minor a competent aliment and allowance forth of the same. Which, if true, (for I doubt exceedingly,) is a most unreasonable law, and downright contrary to the nature and design of tutories, which is for the weal of the pupil, and not of the tutor. See Stair's System, *titulo* 14, Superiority, § 22, p. 257. Yet where the King nominates a tutor to an idiot or furious person, or in such like occasion and caducity, the haill profits go with the tutory, except an aliment, &c.

VI. I think a tutor with us cannot buy a right affecting his minor pupil's lands, but it must be presumed to be for the minor's behoof, and accresce to him. See Craig and Durie's Practiques for this. See 20th November, 1678, *Wishaw* and *Lundie*. *Vide infra*, No. 709. But the difficulty will grow if the tutor sell it to a third

party, who knows not of his being tutor, if it will be *vitium reale* against the singular successor, who is not *particeps fraudis*. *De hoc cogitandum.*

VII. A gift of escheat, if it be not declared, at least generally, was found by the Lords not to be sufficient to purge vitious intromission; *ergo, non relevat*, for purging thereof, to say he was rebel, or his escheat is gifted, unless it be farther added that there is a general declarator obtained thereupon.

VIII. If lands holden of a Bishop be resigned, *ad perpetuam remanentiam*, in the Bishop's hands, by the vassal and feuar, it makes it to become a mortification to the diocess and bishopric, and not to become a part of the Bishop's property, so as to transmit it to his heirs and assignees. If he minds to do that, he must interpose a person that must take the disposition in his name for his behoof.

Advocates' MS. No. 538, folio 274.

1677. *February 2.* MR JAMES LAUDER *against* THE TENANTS OF COCKBURN'S-PATH.

MR JAMES LAUDER, sheriff-clerk of Hadinton, as having right, by disposition from two sisters heirs-portioners, to an husband-land in Cockburn's-path, pursues the tenants for maills and duties, and Wauchop of Stottincleuch for reduction and improbation of a right he had got to it from the husband of one of these two women, upon this reason: 1*mo*, That it was elicited, and called only a factory. 2*do*, It being subscribed by two notaries for him, there was the interval of some days between their subscribing, and so was null, since the act must be done *unico contextu*. Farther, the husband's being guilty of adultery, and having confessed it in the kirk-session, that might be the foundation of a criminal process, whereon being convicted, his escheat would fall, and the gift thereof might be taken by Mr James. Yet it was thought the escheat on adultery was not a liferent escheat, which would carry his *jus mariti*, or the courtesy of Scotland, (for here the wife was lately dead, and there having been a living child between them, he had undoubted right to the courtesy,) but only a single escheat.

The tenants' defence against the maills and duties was, They were tenants to another, by payment of maill and duty, and he not called.

This Newton repelled, as competent against a removing, but not an action for maills and duties. What we were most afraid of, was that our right was null, being granted by a woman clad with a husband, and he not consenting; and it is not enough to say she stands in the fee: therefore, Mr James transacted with the husband and Stottincleuch.

Advocates' MS. No. 539, folio, 274.

1677. *February* 3. ISOBEL BARNES *against* CLAUD HAMILTON.

IN a suspension, Claud Hamilton of Parkhead *contra* Isobel Barnes, the Lords found, (as they had done oft before,) that a debtor will get the cedent's oath, in case either he make it appear by the assignee's oath, or otherwise, that the assignation is to the cedent's behoof; or if to his own behoof, if it be without onerous causes; but he need not say adequate to the worth of what is assigned.

Advocates' MS. No. 540, *folio* 275.

1677. *February* 3. PATRICK LAUDER *against* HOG.

IN an action, Patrick Lauder *contra* Hog, the Lords found a sum lent out by a wife clad with a husband, (though the obligement ran to repay it to herself,) belongs to the husband, or his heirs and executors, unless she could say that she had a provision separate and sejoined by paction from her husband, (like a *peculium*,) not belonging to him; as the Lady Colinton had, and the Lady Dumfermling with Calander. Of which see in other papers.

Advocates' MS. No. 541, *folio* 275.

1677. *February* 8. DAVID COILZIAR *against* CALENDER.

ONE Calender being cautioner in bond for 100 merks to David Coilsiar, and being charged, SUSPENDS,—That he is liberated, because David having lent the principal more money since, he hath taken a bond for all, and so innovated the security, and past from him. ANSWERED,—No novation is presumed in law unless it be expressed: that this was not accepted in satisfaction, but was only a collateral and corroborative security. See fully in the Information.

The Lords found, upon Newton's report to them, it was not a novation or liberation of the cautioner; and therefore found the letters orderly proceeded.

Advocates' MS. No. 543, *folio* 275.

1677. *February* 15. ANENT THE ADVOCATES, OATHS, &c.

THE Lords of Session, in regard of abuses committed by the advocates' men, ordained the advocates themselves hereafter to subscribe all the outgivings and returns of processes.

They say, the Lords have also declared, that no oath hereafter, though never so clear and simple, and free of any qualities, shall be advised but upon inrolling; whereas formerly, under pretence of a plain and distinct [oath,] the clerks would have

got sundry very intricate unclear oaths advised, *affirmative*, proven, or *negative*, not proven, with close doors, without calling the parties or their procurators, the next Saturday after they had deponed.

Nota.—The Lords not only sat in the afternoons oft to advise concluded causes, but also sequestrated the Tuesday forenoons to bring them forward, and to despatch such causes. *Advocates' MS. No. 547, folio 275.*

1677. *February 23.* SARAH ROOME *against* ———

IN Sarah Roome's case, the Lords preferred a creditor to a provision made in a contract-matrimonial in favours of a child of a second marriage, albeit there was an inhibition served upon the said obligement, and the creditor's debt was contracted after the said inhibition; because they found the obligement was only a naked destination, and the inhibition could only reach, prevent, and cut off posterior deeds in favours of another third wife, or of other children, and not of extraneous creditors; else such obligements would enervate all commerce, and would hinder a father from contracting onerous debts. However, this decision evacuates provisions matrimonial sadly. *Vide supra, June*, 1676, *Catharine Mitchell* and *Littlejohns*; and *December*, 1676, No. 524, *inter eosdem.*

Advocates' MS. No. 549, folio 277.

1677. *February.* LORD NEWBYTH *against* JAMES STEWART

JAMES STEWART having a wadset on the lands of Foord, my Lord Newbyth, who had purchased them lands by a declarator, contended they were paid by intromission; and if anything was owing in the count and reckoning, offered to give it in; since he had a very lucrative wadset, and much beyond the annualrent of his money. ALLEGED,—He was not bound to count for the superplus, because his right was a proper wadset, nowise liable to count and reckoning, by the 62d act of the Parliament 1661.

Advocates' MS. No. 550, § 2, folio 277.

1677. *February.* The MARCHIONESS of DOUGLAS, Petitioner, and ISOBEL HADDOWAY, Petitioner.

THE Lady Marquis of Douglas obtained at Secret Council modified to her 2000 merks, for aliment till the first of June, since she did not cohabit with her lord, in respect of some differences betwixt them.

About the same time, one Isobel Haddoway gave in a bill to the Lords of Session against Maccubi, merchant in Edinburgh, her husband, complaining that he

keeped not his own house, and yet gave her no competency to live upon, &c. The Lords ordained him to be cited by a macer, and referred it to Castlehill to hear them, who agreed them together. *Advocates' MS. No.* 550, § 4, *folio* 277.

1677. *February* 24. ——— *against* JOHN LAW.

JOHN LAW, goldsmith in Edinburgh, having arrested a country gentleman within Edinburgh, to find caution as law will, for the price of victual assigned to him; the Lords, upon a bill of complaint made to them, annulled the caution, because of the late act of Parliament in 1672, anent arrestments within burgh. *Advocates' MS. No.* 552, *folio* 278.

1677. *February.* REMARKS ON SUNDRY POINTS OF LAW.

I. HOME of Linthill suspended his minister of Eimouth, Mr Gilbert Innes's general letters, and offered him the worst victual, yea which grew on other lands he had, not lying within that parish. Certainly the Lords will not allow this, but ordain him to give neither the best nor worst. Some venture to give the lame to God, and what will not pay the master's farm shall pay the stipend.

II. I have heard that axiom of law, *Dispositio hominis facit cessare provisionem legis,* as in *testamentaria tutela et successio* preferred to the *legitima,* &c. called in question; for if it were not the will of the law that validated the man's disposition, it would not subsist; it would have no preference: so it is still *legis dispositio adjuvans et concomitans,* that gives it strength: and so *dispositio hominis non facit cessare dispositionem legis,* for the law could prohibit that act which it permits, and overrule it. Yea, in the case of usury, or renouncing the benefit of the acts against it, *pactio hominis non tollit legem;* nor in a husband ordaining his wife to continue tutrix to his bairns, *etiam si ad secundas convolaverit nuptias,* it will not be supported by law: then law predomines over paction, *et pactis privatorum nequit derogari juri publico. L.* 39, *D. de Pactis. Vide supra, numero* 160, [*July,* 1671.] Yet this is only a sophism, for though the law interposes, yet it is only remotely, *permittendo;* the immediate and near influencing cause is the will of the party, and so in many cases, *dispositiohominis facit cessare provisionem legis.* See for this rule, Cujace *ad tit.* 30, *libri* 5, *C. de Legitima Tutela; et legem* 130 *D. de Verborum Significatione, ibique Alciatus et Wissembach.*

III. The Sheriff's fiars are mainly set for this design, to regulate the prices of undelivered bolls by the tenant to their master, to make them liable in that price; yet some masters do, by act of Court, bind their tenants in payment of higher prices than the fiars, in case of failyie of delivery, as 20s. more, *nomine pœnæ.* The Exchequer fialls are set for the King's vassals, who pay in their feu-duties to them as the King's Commissioners, and if it be within L.10, to the Sheriff, by the regulations

of Exchequer made in 1672, act. Their prices are usually set very easy, just as the town of Edinburgh commonly deals with their vassals. This year, 1677, the wheat paid into the Exchequer is estimated to L.5 the boll, the bear to L.4, and the oats to L.3.

IV. Before the year 1646, a suspension of a debt or decreet or registrate bond, stopped both personal and real execution till it was discussed; now it impedes not real execution, except it expressly bear it, which is not frequent. *Vide supra, 22d February, 1671, numero* 141.

V. I find, by an act of the town-council of Edinburgh, dated 23d February, 1591, all that have either given over their houses within burgh, or have been warned by chalking the doors, must flit within 14 days after the term of Whitsunday, &c. (now custom seems to extend it to 40 days;) after which they are said to be so closed within terms that the landlord is not obliged to accept of the keys, but may cause them pay the next term's maill; yet see Durie, 20th July, 1633, Brown *contra* Maxwells; and the violent profits for sitting within burghs is declared to be the double maill. See Stair's System, *Titulo , Of Tacks and Removings,* § .

VI. In a contract-matrimonial, the husband provides the tocher and a sum added to it to himself and wife in liferent, and to the heirs of the marriage in fee, and for his performance finds a cautioner. This cautioner being pursued, offers to fulfil to the relict: but for the heir, says he cannot, because as heir he is bound to relieve and warrant him against his cautionary for his father: and *quem de evictione tenet actio eundem agentem repellit exceptio; frustra petis quod mox es restituturus; et confusione tollitur obligatio,* being both debtor and creditor. If the provision had been made to bairns, it may be it would have made some difference. See this decided, *infra, 23d November,* 1677, *Kennoway. Vide supra, February,* 1674, *Dumfermling* and *Calender,* No. 445, and the cases there cited: particularly Dury, 27*th January,* 1630, *Turnbull:* and 22*d February,* 1656, *Lady Lanton* contra *Rollo.*

Advocates' MS. No. 555, *folio* 279.

1677. *February.* ——— *against* THE EARL OF CAITHNESS.

Eodem tempore.—HE who assumed the title of Earl of Caithness, as nearest contingent in blood, was, by a proclamation, inhibited to take the said style, or the lieges to give it him, on this pretence, that both the estate, honour, and dignity, were resigned in the King's hands in the last Earl's time. And though some doubt of the resigning of honours, yet Sir George Lockhart thinks a man may, in prejudice of his heirs, resign the very title, and surrender and abandon it, *ad perpetuam remanentiam,* in the King's hands, which will extinguish it and consolidate it with the fountain of honour: for our feus are *feuda conditionata,* not the *feuda gentilitia ex pacto et providentia* mentioned in the feudal law, where a man could not resign or abandon the fee without the advice and consent *proximorum agnatorum,* and if he had done it, they had *jus retractus* within such a time; see Craig, *De Jure Protimeseos.* With us a man *in liege poustie* may prejudge his heirs, and give it

to strangers; unless it be in ward lands, in the alienation of more than the half whereof he must have the superior's consent, though not his kinsfolk's. And by this same rule, burghs royal have resigned their freedom and privilege in Parliament, and so expunged the rolls: though it seems their magistrates, commissioner, or other representative, hath less free administration of the town's freedom than a man hath of his own title; yet I have seen it done in Cromarty, Enstruther, Wester, &c.

On the other hand, one may think it hard to hinder the nearest heir-mae to take the style, it having been originally given to that man and his heirs, and nothing should deprive him of this his birthright but a crime that taints the blood. And so this Lord Kenmuire being a cousin, and the nearest to the last Lord, took the title and place without so much as cognoscing himself to be the nearest contingent in blood, (which is sometimes done and makes no passive title,) and yet none quarrels him. It is true to serve and retour himself heir would bind all the debts on him; and it is a pity that the taking the style and place should not infer a gestion; it has been attempted; it would make fewer nobles; but the same behoved to extend also to gentlemen, and burgesses taking their father's style, or entering burgess by him.

They say Somervell of Drum minds to assume the title of Lord Somervell, as being the nearest. See Dury, ——— 1633, *Sir James Douglas of Mordington* contra *the Lord Oliphant. De refutatione feudi, vide* Craig, p. 316.

In September, 1677, Campbell of Glenurchie was created Earl of Caithness; and that gentleman, who is nearest in blood, has raised a reduction against him of his right to the said title. The nearest agnate's reason of reduction is, that Glenurquhy claims the title and dignity upon the last Earl's resignation in the King's hands. Now, the last Earl's right, by which he bruiked the estate, was not as served and retoured, but as singular successor who had bought in a comprising. Now the title of Earl neither was, nor could be, comprised; and so his resignation (though he was nearest in blood) could not convey this title; and the pursuer being served heir to a former Earl, he has the only right to the title. This is somewhat subtile.

Advocates' MS. No. 559, *folio* 279.

1677. *March.* ANENT ROUPS OF ESTATES.

ABOUT the middle of March, 1677, I saw the form of the rouping of the estate of Bogie, both casual and real, done at Kirkcaldy, by virtue of a commission from the Lords of Session at the instance of the creditors, wherein Forret was made judge. It was measured by an hour-glass, and was set at 8000 merks, some 4000 merks below the former auction. Captain Crawford became tacksman to it.

See the Roup of Cunnochie on the 30th of July, 1678.

Advocates' MS. No. 560, *folio* 280.

1677. *May* 8. The MINISTER of PRESTONHAUCH *against* The HERITORS.

THE Bishop of Edinburgh, upon the representation of the minister of Prestonhauch, issued forth a commission to the ministers of that presbytery, to make a visi-

tation of the condition of the said church and yard-dike, it being ruinous; to the effect they might convene tradesmen and examine them upon oath, what truly it would take to repair it; and then to impose the same by the common stent-roll of paying their other cesses and taxations, conform to their respective rents and interests in the parish, upon the gentlemen and heritors parishioners. At the meeting, a visible necessity was seen for repairing: but the method prescribed in the commission was thought only to be subsidiary, in case the heritors could not agree amongst themselves; for tradesmen will be ready to value high on hopes to get the work to themselves; and therefore others should be employed besides them who value it.

It was ALLEGED,—The parson by the law was bound to uphold the quire. It was ANSWERED,—That holds only when they are in possession of the teinds. Then ALLEGED,—Some of the most considerable heritors wanted a convenient seat, as particularly Waughton, whose aisle was remote from the pulpit, and therefore no repairing. ALLEGED,—If by this delay the winter came on, it would make the reparation much dearer, and therefore the one needed not stop the other.

It was recommended to the heritors to meet amongst themselves, to call for workmen, and settle as easy as they could, for repairing the kirk, and to stent themselves; as also, to accommodate all with seats and give every one a proportion of the church, less or more, conform to his interest and land in the parish.

In some places, they declare all the room and seats in the church vacant, and then divide.

Advocates' MS. No. 563, folio 280.

SUMMER SESSION.

1677. *June* 1. ANENT THE LORDS OF SESSION, AND THE ADVOCATES.

I. THIS day, the Lords resolved to have taffety purple gowns for the two months of summer, their cloth ones lined with velvet being too heavy. Yet this did take no effect then. And they of themselves cannot alter the habit, since the King, by the eighth act in 1609, and Charles I. by the third act in 1633, are empowered solely to determine the habits of judges and magistrates; yet these acts seem to have been merely personal and temporal.

II. The Lords ordained the advocates to attend at nine hours the month of June, and half nine all July; which does not agree with the 49th act of the Parliament in 1537, by which three hours attendance is all can be required of the advocates. See this enlarged out of Mænagius, &c. *alibi.*

III. One day at a meeting for examination, the advocates convening very thin, it was inquired how many advocates went to a quorum. Sir Andrew Birny, Dean of Faculty, thought ten made a quorum, because that was the original number of the advocates at the first erection and institution of the College of Justice. But in

this he failed, for the 64th act Parliament 1537, names but eight advocates; and eight is a quorum of the Session, being the major part of the fifteen Ordinaries. Yet act 57th *dicto Parliamento* requires ten Lords besides the President or Chancellor; but this is not observed: yea in the Saturday or in the afternoons, or when there have been four Lords at the side-bar, and one on the bench of the Outer-House, I have seen the Lords within not six, with the President. Only they pretend, that concluded causes may be advised, and deliverances on bills given, by a number under the quorum; yet I see no warrant for this, and concluded causes require a great deal of attention and skill; and the Lords present are not only written in the sederunt-books, but were always inserted in the beginning of all decreets, even for some years after the King's Restoration in 1661, (though now disused I know not why,) that it may appear how many were present at the pronouncing the decreet. Yet I know not how the Lords would take it, if one of their sentences were offered to be reduced upon that reason, that it can be proven there were not a quorum of the Lords at the advising it, whether it be an interlocutory point or definitive. *Vide 3d June*, 1679. *Advocates' MS. No. 565, § 1, 2, and 3, folio 283.*

1677. *June* 1. ANENT THE ARRESTING OF CORPSES.

IT was queried amongst the advocates, If a dead corpse might, in the law and practice of Scotland, be arrested and stopt from interment for debt by creditors; on occasion of the Countess of Winton, who died this day, and being addebted to merchants and to sundry trades-people for vivers and other necessaries, they made a great clamour, being poor, and fearing the Earl, her husband, because of the differences, would not own her debt farther than her annuity of 6000 merks reached, which was all forenailed already: They were talking of arresting her body. But certainly though it be tolerated in Holland and some other places, it is reprobated by us as a most barbarous, inhumane custom. Yea the law condemns it for irrational. See Harprecht, *in Commentario, ad § 9 Institut. de Jure Naturali, Gentium, et Civili, numero* 17; where you have express texts prohibiting it, *sub pœna omissionis debiti.* Yea, *mortuo bove legato, nec corium nec caro debetur*, L. 49 *in princ. D. de Legatis, 2do; Multo minus hominis debentur exuviæ, mortuo homine. Vide novellam* 60. See Vantien's Notes on the title *Instit. de Jure Naturali, Gentium, &c.* It could be done upon nothing with us, (except it were upon an express supplication to the Lords of Session, or to Secret Council, which would never be granted,) unless upon a caption which no messenger could execute, since it commands to apprehend the person of such a man or woman; now, being dead, it is no more a person, no more a *hypostasis*, the union being dissolved. However, this arresting has been attempted as to persons dying in prison, but was never allowed nor sustained; only I have heard that a man who dies in prison, it is, *ipso facto*, a discharge of all his debt; this, I think, holds in England, but not with us. Yet when any person dies in the tolbooth, the magistrates cause sight them before famous witnesses, especially the creditors, (if they can be got,) to shew they are truly dead, that no fraud be done of liberating living folk under the pretence as if they were dead.

Advocates' MS. No. 565, § 4, folio 283.

1676 and 1677. JAMES RAMSAY, Bishop of Dumblaine, *against* FRANCIS KINLOCH of Gilmerton.

1676. *July.*—MR JAMES RAMSAY, Bishop of Dumblaine, having charged Francis Kinloch of Gilmerton, upon his general letters, to pay him eight chalders and a half of victual, being an annuity mortified by King James in 1620, furth of the lands of Markill, whereof the said Francis is heritor, to the deanery of the chapel-royal, which is annexed to the bishopric of Dumblaine;—he suspended upon this reason, that the annuity was originally granted in 1587, furth of these lands, by the then Earl of Bothwell, to Mr Thomas Craig, advocate, redeemable upon the payment of 7000 merks, and upon Bothwell's forfaulture, fell to Lennox, then to Buccleuch, the donatars. Buccleuch disponed these lands to the Earl of Winton, for the behoof of Sir George Seton; which Sir George paid the 7000 merks to the King, and got a grant of redemption; which right is now in the suspender's person by progress. So it being extinguished, the suspender's lands are free; and the King being sensible thereof, wrote to his Exchequer, that an equivalent annuity, in place thereof, might be settled upon the said deanery, furth of his feu-farms. See *13th January*, 1680, *Nunton* and the *Town of Kirkcudbright*.

To which it was ANSWERED for the bishop, that the reason ought to be repelled, in regard, he and his predecessors have peaceably bruiked the said annuity by the space of fifty years, from 1620, till 1672; and that Francis the suspender paid peaceably from 1661, till 1672, by the space of eleven years. That after so long possession he was not holden to debate what right his Majesty, who founded the said annuity, had thereto; but it was sufficient for him, being a beneficed person, to prove this annuity was a part of his benefice, and possessed so; *et secundum regulam cancellariæ apostolicæ,* (super qua vide Gomezium, in commentario ad dictas regulas,) in beneficiis triennalis et decennalis possessor non tenetur docere de titulo*, but that possession *habetur pro justo titulo*. And the pretended redemption falls within the time of the act of Parliament, restoring bishops, in 1662, rescinding all acts done to their prejudice, and restoring them to whatever they possessed in 1637.

REPLIED for the suspender,—That the rule anent *decennalis et triennalis possessio* is but a presumptive right; and though it may maintain beneficed persons, where they are not able to shew any more, yet where his right can be condescended on, is founded upon, and produced, as here in this case, and is found to be null and extinguished by payment,—that rule will not proceed; and it is just of the nature of the act of Parliament in 1584, anent retouring quinquennial possession in favours of the King, which proceeds *presumptive*. *2do*, The rule of the chancery is derogated from by an express act of sederunt, altering the space, and settling twenty years possession of benefices to be the rule before the Reformation, and thirty thereafter. *3tio*, Rights of lands, in our law, cannot prescribe with less than forty years possession. *4to*, Possession that induces a right and clear title in favours of church-

* *Vide* Stair's System, Tit. 12, *Of real rights*, No. 25, page 181; where, in my animadversions apart, see two difficulties against this *regula cancellariæ*. *1mo*, It seems contradictory why *triennalis*, and again *decennalis*; that is unintelligible. *2do*, It seems dissonant to our law, and contrary to that Act of Sederunt in December, 1612, appointing ten years' possession before the Reformation, and thirty since; *vis.* August 1560, as the 55th act of the Parliament in 1578 bears.

men or others, must be peaceable and uninterrupted; but the charger's was *turbata*, by declarators, &c.

DUPLIED,—The *regula cancellariæ* was not merely a presumptive, but a full and complete title; because, where a beneficed person possesses lands or rents during that space as a part of his benefice, *lex statuit super presumpto tanquam vero presumptione juris et de jure, quæ omnem probationem in contrarium respuit*; for if beneficed persons were obliged to debate their founders' rights, it would shake the foundations of the most part of benefices in Scotland, who have nothing to shew but a provision and possession conform; a preparative that all our bishops and clergy are concerned at in the highest degree. Neither does any defence arise *ex gremio* of the charger's title and right; the same being by his Majesty purely, simply, and absolutely constituted, without any qualification or reversion; so that he can never be obliged to debate upon extrinsic grounds not contained in the foundation, especially *hoc loco* in a suspension, since it cannot be presumed he knows the conditions of his author's rights. And, notwithstanding of the grant of redemption, Francis still continued to pay; and, being conscious of the invalidity of his own right, he procured from his Majesty a precept upon the Exchequer for L.1000 sterling in lieu of it; and if he had gotten payment of that, he would never have made contradiction to the bishop's right; likeas he paid not a sixpence to White for that annuity, so that he is *in lucro captando*.

The Lords, by their interlocutor, suspended the bishop's letters *simpliciter*, and found he had no right to the said annuity; and therefore assoilyied Francis, and declared his lands free thereof.

This decision made all people to talk largely of bribery and partiality; for, at this time, Francis, and Mr Roguehead, the clerk, his son-in-law, were contriving to give Halton, and some other persons, L.5000 sterling, in gratuity, out of the town of Edinburgh's revenue and cash; which as it made this go smoothly, so it also anointed the wheels of the following cause between the same Francis and Abotshall. The bishops were aghast at the interlocutor; for it is undoubtedly of bad influence and example to teach men to brangle their rights, the most of them leaning merely upon possession. The President took pains to appease and mitigate them, and drew up reasons in fortification of the Lords' sentence, (which was stolen through at an unfrequent afternoon's meeting,) proving the justice and legality of it; and gave the Bishop of Galloway, Mr Jo. Paterson, a copy of them; and which softening plaster, knowing many watch for their halting, he uses in any other controverted interlocutors. *Supra, numero* 446. But it seemed very unjustifiable that in a suspension, rights of land, and such like titles, should have been so summarily discussed and annulled; for old form dictates that possession is to be continued, *Interdicto uti possidetis*, and the validity of the right remitted to a reduction. Dury, 12th *March*, 1629, *Marshall* against *Drumkilbo*. But their answer to this is, that they could not have legally nor warrantably judged upon his title and right, if it had not been produced, which they could not have forced him to have done in a suspension; but they being once produced, and *in campo*, and found invalid, the Lords might instantly judge upon them, as if they had been in a reduction. And if he had defended on his naked possession, without founding on a title, it had been more secure for him, for that would have burdened Francis with the producing and proving the nullity and invalidity of his title. This is warranted from Antonius Faber, *in Codice Sabando, Tit. de sacro-sanctis ecclesiis, definit.* 5. *Triennalis possessor exhibens titu-*

lum invalidum vel vitiosum non juvatur; Regula cancellariæ de triennali, ex Gomesio.

Yet on the 21st February 1677, the Bishop of Dumblaine having produced a clear and undoubted right and progress to that reversion, he gained the cause against Francis, and the letters were found orderly proceeded.

Advocates' MS. No. 487, *folio* 251.

1677, *June* 5.—THOUGH in February last, the letters were found orderly proceeded, at Mr James Ramsay, Bishop of Dumblaine, his instance, *contra* Francis Kinloch; yet he had got it stopt to the 1st of June; and now again, upon a bill pretending he would take off their forty or rather eighty years peaceable possession by interruptions, (without condescending on any in particular,) Francis prevailed so far as to get a new stop, for producing his interruptions, till the 16th of July.

Advocates' MS. No. 566, *folio* 284.

1676, and 1677. MATTHEW LAURY *against* JAMES BROWN.

1676, *February.*—MATTHEW LAURY, Fletcher in Dalkieth, having charged James Brown, Cordiner there, upon a bond of 300 merks, Brown suspends, and raises reduction upon this ground, that he offered to prove by the charger's oath, that the true cause of the granting of the bond was not borrowed money as it bore; which being once confessed and acknowledged by him, then offered to prove *per testes instrumentarios* inserted, that the true cause of the granting the said bond was, that the charger having married the suspender's sister, by contract of marriage, the suspender and his mother became obliged, *nomine dotis*, to pay to the charger 500 merks in two moieties, 200 merks at one term, and the remanent 300 at another. And though the charger's mother having given bond for the last 300 merks, did pay it, but contented herself with a discharge of it, (as she had also taken of the 200 merks preceding,) without getting up her bond; when she is dead, Laury, the charger, most fraudulently affirms to this suspender, who knew no better, that the 300 merks in the bond (which he shewed him) were still owing to him; whereon Brown the suspender, being a simple and ignorant man, retires his mother's bond, and grants this new one charged on, and afterwards finds the discharges of the tocher. And so it being proven by the writer and witnesses inserted, that the cause of the granting this bond, was for a remain of that tocher; then offers to prove, *scripto vel juramento*, that the whole 500 merks of tocher was paid. And so the bond being granted by error and simplicity on the one hand, and evident circumvention and dole upon the other; and being granted for the same cause for which the mother's bond was given, and that being extinguished by payment and satisfaction, and reduced *ad non causam;* this bond must fall *in consequentiam*, as being in the charger's hands and custody *indebite et sine omni causa*, and therefore ought to be delivered up to the suspender, to be cancelled by him.

To this it was ANSWERED, that the reason was very relevant if true, but the *modus probandi* was nowise allowable, since his bond could be nowise taken away but by his own oath, or a contrary writ.

This being taken to interlocutor, the Lords allowed the reason to be proven in the foresaid manner condescended upon, and found it was his own oath took away the bond, (and not witnesses,) if he once acknowledged the cause of the granting thereof not to have been for borrowed money as it purported; for then *ex officio*, they ordained the writer and witnesses mentioned in the bond, to be examined before answer, anent what they heard or knew, the time of the subscribing, to have been the cause why Brown the suspender gave this 300 merks bond to Laurie the charger, and if it was for a remain of tocher. See for this case, *supra*, November, 1673, [Syme *against* Inglis,] No. 429, and the two citations from Dury there.

On the 6th of June, 1677, the Lords having advised Laurie's oath with the testimonies of the witnesses in the bond, they found Brown's reason of reduction not proven thereby, and therefore assoilyied, and found the letters on the bond orderly proceeded at Laurie's instance. *Advocates' MS. No.* 470, *folio* 243.

1677. *June* 9. ANENT PROOF OF BASTARDY.

JAMES BROWN, Advocate, had this case debated. One is ALLEGED to be a bastard; and for proving of it, a seasine of his is produced, wherein the notary designs him *filius naturalis* of such a man. They were to have the Lords' answer, if this was sufficient to prove bastardy *in re antiqua*. It may be, the notary thought the word *naturalis* good enough Latin to signify and design a lawful son, and opposed it only *filio adoptivo*, as sometimes it is done in law. I scarce think it a sufficient probation alone, though it may pass for an adminicle.

Advocates' MS. No. 567, *folio* 284.

1677. *June* 9. GUTHRIES *against* the LAIRD of GUTHRY.

IN the action, Guthries in Arbroath *contra* the Laird of Guthry, it was FOUND,

1*mo*, One that stands infeft only in an annualrent furth of lands, cannot pursue a reduction of rights of the property, as of a comprising, or wadset, or irredeemable disposition of that land.

2*do*, That an annualrenter cannot properly pursue an action for maills and duties, but only its natural action of poinding the ground, unless the annualrenter has used arrestment in the tenants' hand, and then he may pursue maills and duties, or rather to make them forthcoming. See this remarked *alibi*, in the fifth leaf of my manuscript of Miscellaneous Law Observations.

3*tio*, Though in the dispositive part there be three sundry annualrents mentioned and disponed; yet if the seasine at the clause about the act of tradition of earth and stone and a penny, bear only infeftment to have been given of one of the annualrents, through the omission and informality of the notary, they will get poinding of the ground for no more but that one annualrent expressed, till they take a new seasine for the rest.

4to, The benefit of a possessory judgment, is sometimes a good defence against maills and duties, but not against an infeftment of annualrent; though it will hinder and stop the tenants from being decerned in maills and duties, yet it will not stay the ground from being poinded. See the information of this cause beside me. See thir parties, *8th November*, 1679, [Dictionary, page 9069;] *item*, [*Boog* against *Muir*, *30th July*, 1679.] *Vide infra*, [No. 579,] *Sir John Scot's* case, [*June*, 1677.]

Advocates' MS. No. 568, *folio* 284.

1677. *June* 13. BAILIE *against* GORDON.

ONE gets a wadset in 1643, from the Marquis of Huntly, of three chalder of feu-duties, payable to the said Marquis, (which is *feudifirma feudifirmarum*, discharged in the King's property, act in 1597,) redeemable on 4000 merks, and holden base of himself. (See this in the other MS. 15th November, 1677, page 4.) The wadset is granted to the mother in life-rent, and to her son in fee. The mother having married a second husband, and so, *jure mariti*, he having right to the life-rent, he buys also the right of the fee from her son the fiar, and gets a disposition thereof. Within two months after this, the son who was fiar, (notwithstanding the alienation he had made of it,) does fraudulently infeft his own wife in the right of that wadset, she not being *fraudis particeps*. Within a month after her right, he who had acquired the right of fee from the son, confirms it, and so makes it public, and cleds it with possession. After this, a competition arising betwixt him and the relict of the son,

She ALLEGED her right though posterior was preferable, because her husband's possession was her possession, and she could not *per rerum naturam*, possess otherwise, *vivo marito*, but *jure constituti, et fictione unitatis*, and in his right; and her right was a month anterior to his confirmation, and so she was first clad with possession. ANSWERED, her right could not be reputed clad by her husband's possession, since he had none, being merely fiar, and his mother (whose right the husband had) being liferenter. REPLIED, her husband's right of fee was clad with possession, by his mother's possession, through the reservation of the liferent to her, and consequently the wife's right (which was derived from her husband,) must be reputed as clad with her mother-in-law's possession.

Though this seemed very metaphysical, and made a *progressus in ficta possessione*, and was *fictio fictionis*; (which some reprobate; yet see Hoteman, *in Quæstionibus Illustribus*, and my summary of him;) yet the Lords inclined to have sustained it, to prefer the relict before the other anterior right.

Advocates' MS. No. 569, *folio* 284.

1677. *June* 13. ANENT INFERIOR JUDGES.

I THINK no inferior judge competent to actions of declarators, of commission, of

irritant clauses, or back-tacks in improper wadsets, &c. See the act in 1672, anent the regulations of the session.

I think it also a good reason of suspension and reduction of an inferior decreet, that the court was not kept at the usual place, and that no legal intimation of the charge was made. And thir two grounds were so far sustained, that the Lords turned the decreet into a libel; (it being in absence, holding tenants as confessed upon exorbitant quantities;) and reponed the tenants to their oaths, as to their true verity, in the case of *Kennan* contra *Carlylle*, &c. See the information of it beside me. See Dury, 23*d January*, 1624, *Meldrum* and *Meldrum*. See Craigie's Collection *verbo Escheats*.

Advocates' MS. No. 570, *folio* 284.

1677. *June* 14*th*. The EARL of NORTHESK *against* The EARL of SOUTHESK.

IN the competition for the church of betwixt Mr Lammy, presented thereto by the Earl of Southesk, alleging himself to be patron, and Mr Couts, presented by Northesk, also laying claim to the patronage; and the complaint of the riot made to the Secret Council, by Couts, against Lammy: (*Vide infra*, No. 656, Patronage of Ellon:) The Secret Council referred the competition and debate, anent the right of patronage, to the judge-ordinary; and recommended to the Session, to discuss it summarily, without libel, inrolling, or any other delay,—which of the two should preach and officiate in the meantime at the church controverted; or if none of them but another, referred it to the discretion of the Archbishop of St Andrew's. And as for the riot, which was little or none at all, they kept it before themselves. As for the point of right, it was

ALLEGED for the Earl of Northesk, that this kirk was made up of two by union, whereof his authors and predecessors were patrons to one, and Southesk patrons to the other; so that now they had the presentations *per vices*, of this one kirk, conform to the express decision of the 3d act, Parliament 1617; and that he was infeft in the said patronage *alternatis vicibus*, and that Southesk had presented last; and though that was enough to give him this *vice* without saying more, yet he produced also a writ under the last Earl of Southesk's hand, declaring the next turn to present was Northesk's.

To this last Southesk ANSWERED, it was a personal obligement, and so could not bind him a singular successor.

REPLIED, 1*mo*, He was successor *titulo lucrativo*, by accepting a disposition after that paper. 2*do*, They were in no strait nor need to make use of it.

The Lords preferred Northesk, and found he had best right to this *vice*, and discharged Lammy ever to lay claim to it hereafter.

There was another point not debated, that it would have debarred Couts, and that was on the *jus devolutum*. Both pretended patrons had omitted to present for six months; the Bishop of Brichen, within whose diocess it lay, had presented another, who, if he had appeared and laid claim, would have undoubtedly had the best right; but it seems Couts has prevailed with him to desist.

Advocates' MS. No. 572, *folio* 284.

1677. *June.* THOMAS DALMAHOY *against* The EARL of CALENDER.

THE Earl of Calendar being made donatar to the escheat of Thomas Dalmahoy, Esquire, who married the Dutchess Dowager of Hamilton, mother to the Ladies Calendar, Southesk, Blair, Robertland; and having empowered Mr John Eleis, elder, with a factory thereanent; (See his process with Southesk, *supra*, No. 507:) Mr Dalmahoy raised a reduction of the horning and gift: 1*mo*, because his interest when denounced was only *jure mariti*, and that his interest the time of the gift was ceased by the dutchess' decease. This the Lords repelled, in regard it was offered to be proven he was *locupletior factus*, and so behoved to be liable *in quantum lucratus*.

The 2d reason was, that the denunciation was abusive, because at the time the dutchess was debtor to them in a legacy of L.500 Sterling, left them by their father. ANSWERED, that was left them for aliment, and she alimented them conform, and so fulfilled the legacy *in forma specifica*. REPLIED, then it was a compensation the time of the denunciation, and so extinguished the debt *ipso jure*, and made the denunciation null. The Lords inclined upon this to find the denunciation null. *Advocates' MS. No. 574, § 1, folio 285.*

1677. *June.* ANENT REGALITIES.

IT is alleged by some, that regalities have power of repledgiation in civil things, as well as in criminals. Others deny it. The towns of Dumbar and Hadington have clear clauses in their charters, exeming their burgesses from the sheriff, and empowering them in all causes to repledge from him; see them, *supra*, No. 551, § 4. Yet the regality of Kirkliston, now disponed by my Lord Winton to Hoptoun, claims the casualities of single escheats; see Hadington, *26th February*, 1622 and *Earl of Winton*. *Advocates' MS. No. 574, § 2, folio 285.*

1675. EDMISTON *against* JO. RODGER.

THEY tell of a case in 1675, between one Edmiston, and one Jo. Rodger, the agent. A debtor and two cautioners having granted bond for a sum of money; the bond contained a clause of relief from the principal to the two cautioners, but no clause of relief amongst the two cautioners themselves. One of the cautioners being distressed for the whole, pays it, and takes an assignation in a blank person's name, and thereafter fills up a confident's name therein; who, pursuing the concautioner for the haill, he suspended on this reason, that he was only liable for the half, and the debt being paid by the concautioner's means, he behooved to defaulk the one half and allow it. ANSWERED, there being no clause of relief between the cautioners, the one is not bound to relieve the other. The Lords found the clause of mutual relief among the concautioners *quod inerat de jure*, and they were bound

to defaize their own parts one to another *pro rata portione*, though there was no clause, paction, or obligement tying them thereto. I think this would not hold in the civil law, and was a stretch thereof, and dissonant to its principles. In June, 1677, the same case occurred to be disputed again. *Vide February*, 1680.

Advocates' MS. No. 574, § 3, *folio* 285.

Anent Testaments and Inventories.

If a creditor give up a person as his debtor, in his testament, in such a particular sum, if a greater sum be found to be in the debtor's bond, it seems to be *legatum liberationis pro reliquo*; and which legacy will sustain in so far as amounts to the dead's part of the moveables, and no farther. See Balfour's Practicks, *titulo* 19, *Of Payment, numero* 7. See *alibi*, this remarked at large in other papers; *Vide supra, numero* 421, *November*, 1673, *Sir James Douglas* against *Hayston*. *Vide Gudelinum de jure novissimo, libro* 2, *cap.* 9, *pag.* 62.

1677. *June.*—A man with his own hand, at his marriage writes an inventory of all the goods, and inventory of his house, and subscribes it; and among other articles he sets down a mazer cup of Mævius. The writer dying, and Mævius also being dead, the executors of Mævius pursue the executors of the writer of the inventory, for delivery of that cup. *Quæritur*, 1*mo*, if this will be a sufficient constitution of the debt, viz. his declaration in that inventory, since the expression is ambiguous, and may be expounded, The cup I bought or got from Mævius; yet in strict propriety of speech, it imports the cup belonging to Mævius. It may be lent to me, or consigned and depositate in my hands *custodiæ causa:* only the placing it in the inventory of his own goods, the diuturnity of time, and the silence, do much fortify the possession, and weaken the claimer's right. Yea, even an inventory given up by a party at his death, in his testament, does not so prove but it may be questioned by creditors, as short given up, or undervalued; like our datives *ad omissa*, or *male appretiata*. *Vide, Novellam* 48, *de Jurejurando a moriente præstito super mensuram suæ substantiæ*, and Gothofred's notes there.

In the abovementioned pursuit by Mævius's executors, the inventory being questioned as holograph, and the subscription denied, the judge repelled this, without putting them to adminiculate the verity of the subscription, because it consisted in his own private knowledge that that was his hand write, which he knew very well.

This seems to have been evil determined, for he should not decide *secundum privatam scientiam*, but, *secundum allegata et probata:—eleganter Vinnius, ad § Institut. de Officio judicis. Vide immediate supra, numero* 573.

Advocates' MS. No. 574, § 4, *folio* 285.

1677. *June.* William Syme *against* Hamilton of Bardowie.

William Syme, as assignee constituted to a bond owing by Hamilton of Bardowie, pursues Bardowie's son upon the passive titles. He alleged absolvitor from the passive title, as vitious intromittor with his moveable goods and gear; because

he offers him to prove there is an executor confirmed before the intention of this cause. *2do*, Absolvitor from the passive title, as intromittor with the maills and duties of his father's lands; because offers to prove his father was denuded of the fee of these lands in his favour.

Thir defences were found relevant to purge thir odious titles. But as to the alternative, *successor titulo lucrativo post contractum debitum*, it would not do against it. *Vide infra*, No. 575, [*June*, 1677, *Kincaid* against *Gordon*.]

Advocates' MS. No. 574, § 5, *folio* 285.

BOSWELL *against* BOSWELL.

IN a pursuit *in anno* 1662, Boswell in Kinghorn, *contra* Boswell, (whereof I have seen the decreet,) it was ALLEGED for the defender, No process against him as successor *titulo lucrativo post contractum debitum*, because he offered him to prove, though he was apparent and nearest heir, yet the disposition was not merely gratuitous and destitute of all onerous cause; but he had these lands disponed to him for sums of money he either had paid, or was obliged to pay, near the half of the worth of the lands, if not more: and so it is to be called an onerous cause more than a lucrative, since the onerous cause predomines, *et unumquodque denominatur a majore et famosiore parte:* it is more onerous than lucrative. ANSWERED, to make it relevant they ought to say not only onerous but adequate, else it is still lucrative.—And so the Lords find to this effect, to make up what is wanting of the price. And so they ordained Sir A. Seaton, of Pitmedden, in his plea with the daughters of Blair, to allege an adequate full price, as ordinarly then given in the country. *Vide supra*, No. 538, *in margine*, [28*th January*, 1677.] See this marked beside me *alibi*, in some small alphabetical practiques since the King's restoration, *voce successor lucrative*.

Now the Lords liberate from this passive title, if he have paid 9 parts of 12, of the price. See 29*th November*, 1678, *Hagins* against *Maxwell*.

Advocates' MS. No. 574, § 6, *folio* 286.

1677. *June*. ANENT VITIOUS INTROMISSION.

I. IF a stranger shall meddle and intromit with the moveable heirship, it will bind no passive title on him, as the intromission with the moveable goods would do; because heirship is of the nature of heritage, in which no passive titles quadrate against any but those who are *alioqui successuri*. But the stranger's intromission will bind him to simple restitution, and infer vitious intromission, but no passive title. *Advocates' MS. No.* 574, § 7, *folio* 286.

II. One is convened as vitious intromitter with the goods and gear of such a man, and it is libelled, that that man vitiously intromitted with the goods and gear of another person, whom they instruct to have been their debtor by bond or decreet.

The Lords will not allow the probation of this progress, or to prove, after a man's decease, that he intromitted without a title; because if he had been convened in his own lifetime, and questioned, he might have purged the intromission, and ascribed it to some title, which none else now knows; besides this passive title of vitious intromission *sapit naturam delicti*, it is penal; *morte extinguitur, nec transit in hæredes, nisi ejus dolo lucrum ad eum perventum sit, vel lis cum defuncto contesta fuerit*; by which *perpetuatur actio.* And this the Lords decided justly in the case of *Wilkieson*, in 1666. See it in Stair's System, tit. 31, Of Vitious Intromission, *num. ult.* and my Annotations on it there.

Advocates' MS. No. 574, § 8, *folio* 286.

1677. *June.* ——— *against* WILLIAM BRODIE.

ONE pursuing as heir served and retoured, and no retour being produced, Mr William Bailie alleged, no process, because the active title not produced. Halton repelled it. Mr William huffed at the novity, and offered a dollar for the Lords' answer. The Lords, to save Halton's credit, in June, 1677, permitted a pursuer to produce a retour as his *active* title, *cum processu.* Which was to evert all form. And yet Halton was pleased with the report, to give Mr Bailie a rebuke. *Vide supra*, No. 441, [*Duke of Hamilton* against *Loudon, February*, 1674;] and 490, [*Hay* against *Earl of Twedale, July*, 1676;] *infra*, 579, § 4, [*June*, 1677.] Yea, a seasine alone was not found a sufficient title in a reduction of heritable rights without the charter, but the Lords will allow it whiles to be produced *cum processu.*

Advocates' MS. No. 574, § 9, *folio* 286.

1677. *June.* ANENT LYING OUT UNENTERED.

A MAN is married on a woman that is apparent heir to lands, either burgage or without burgh. She, to defraud her husband either of the *jus mariti* or the courtesy, lies out and will not enter. *Quæritur, quid juris*, Is there no remedy in law to force a malicious woman to do what is just? Sir George Lockhart thought, the husband by his marriage, had a rational and well founded interest whereon to compel her to enter; only the law had not provided for that case, not being frequent nor *casus cogitatus.* Yet it had supplied the ordinary case where apparent heirs lay out to prejudge creditors, by charging them to enter heir within 40 days, conform to the 104th act Parliament 1540. See my marginal notes on it. That the husband was *quodammodo* a creditor, and *ex æquitate prætoria* the method of that act might be extended to him, and the defect made up, that the wife *ex suo dolo non lucretur*,— neither prejudge his *jus maritale* nor *curiale.*

Advocates' MS. No. 574, § 10, *folio* 286.

1677. *June.* JOHN KINCAID *against* GORDON of Aberzeldie.

MR JOHN KINCAID, advocate, pursues Gordon of Aberzeldie upon the passive titles, (see the preceding number, sections 5, 6, 7, and 8,) for payment of a debt owing by his father; and for purging his intromission with the rents of lands. He having produced a tolerance from the donatar to the liferent, the tolerance was offered to be improven. Whereon Aberzeldy took it up, and the Lords allowed him to pass from it; (which is strange, and may encourage all falsehood;) and to propone a new dressed defence, viz. that the escheat was gifted and declared. Which they found relevant, *per se*, to purge the passive title of vitious intromitter, he being singly countable to the donatar; and so would not burden him to subsume that he bruiked and possessed by his tolerance and licence. *2do*, He defended himself upon a comprising of his father's lands, which he had acquired, and so was a singular successor. Mr John Kincaid offered to redeem him, conform to the 62d act of Parliament in 1661, between debtor and creditor.

ANSWERED,—Mr John was only a personal creditor, and so by the act of Parliament 1661, had no interest to redeem, the act only allowing that benefit to posterior apprisers.

REPLIED,—A personal creditor may as well redeem from an apparent heir buying in rights on his predecessor's estate, as he may reduce deeds *ex capite inhibitionis*, or *ex capite lecti ægritudinis*, though he establish no real right in his person. However, as it is safest, so it is very easy for the personal creditor, who as yet, hath neither adjudged, nor apprised, to make up a real right in his person, by adjudication or apprising, and that will give him an undoubted interest to redeem the apparent heir. *Vide supra, 5th July*, 1671, *Kirkconnell*, No. 204. Only the order of redemption must be used within ten years after the heir has acquired the right of apprising or adjudication in his person, or in another's to his behoof, (for thus requires the act 1661;) and not at any time within ten years after the legal of the said apprisings is expired, though it should be longer since the apparent heir had purchased it; as some, by mistake, would have it to be.

Advocates' MS. No. 575, folio 286.

1677. *June* 19. MACMINE *against* NEWLANDS.

IN the suspension, Macmine *contra* Newlands, Halton turned a decreet of the Sheriff of Dumfries to a libel, because the decreet at the compearance did not bear that the procurator had a warrant and mandate from the client employer to compear; especially, it being confessed in the decreet, that the defender was then in England, at Carlylle. But this was pretty hard; for there is not a decreet of twenty that mentions and bears a warrant; and though these inferior procurators [happen] to have one, yet it needs not be mentioned and inserted; and in the reduction of the decreet only the warrant may be called for, and production thereof forced, and if it be not produced, the decreet, *quoad* the compearance, will fall.

2do, Esto it had been a decreet in absence, every such decreet is not to be in-

stantly turned to a libel. *Vide infra, 8th November*, 1677, *Grant* and *Cuthbert*, No. 648; *infra*, No. 663, *27th November*, 1677, *Corson* and *Maxwell*.

Advocates' MS. No. 576, folio 286.

REMARKS ON SUNDRY POINTS OF LAW.

I.—Anent Found Treasure.

It was started amongst the advocates, If *Thesauri reperti, quorum non cognoscitur ob temporis vetustatem dominus*, be *inter regalia*; for, by the Roman law, they were divided *inter repertorem et dominum fundi*, § 39, *Institut. de rerum divisione et acquirendo rerum dominio*. But with us, there is no doubt but mines of gold and silver they belong to the King, by the 12th act, Parliament 1424; and Craig, *Feudorum libro primo, Diegesi ultima, pagina* 119. (*Vide infra, July*, 1677, *Duke of York* and *Argile*, No. 625.) And the customs of most nations have now also adjudged them as *bona vacantia caduca et* δεσποτα to the sovereign power. See Sixtinus *de Regalibus*, and all the Feudalists, upon the *Titulus Feudorum, Quæ sunt regalia*, and particularly Matthæus *de Afflictis* there. As to minerals, the 27th act of the Parliament 1649, to encourage heritors to seek them, restricted the King's part to a tenth; now, that Parliament being rescinded, the King's right as to the whole returns again.

II.—Anent the Borgh or Caution of Haimhald.

It was at this time queried, if the borgh or caution of haimhald, and vindication of goods, particularly horses bought in a market, was only *cautio judicio sisti*, to present the seller, or also *judicatum solvi*, to pay and undergo *totum litis eventum*. It was thought to import both. See Stair's System, tit. 12, *Of Real Rights, in fine*.

III.—Anent False Writs.

Where one is assigned to a bond, or succeeds as heir to it, or adjudges it, or confirms it *qua* creditor, or otherwise, and the bond is offered to be improven as false and feinyied; *quærebatur*,—at this time, in the case of *Hamilton of Monkland*, If an heir or other successor, (who may be *ignarus omnis fraudis*,) be obliged to abide at it, or pass from it; since the 22d Act in 1621 makes naked using of a false writ falsehood. Though it seems hard to tie them under the peril as *falsarii*, since they may be very probably ignorant of it. Yet falsehood should never be got punished, if heirs, assignees, and all users were not obliged to bide by it; for how easy were it for a father to forge a bond and leave it in his charter-kist, and his heir without any hazard then might use it; or for a man to assign it, and the assignee to insist for the money. This would open a large door to knavery, which is grown too bold already. Yet Dury, at the *5th of February*, 1635, *Ker* contra *Forsyth of Dykes*, shews the Lords then demurred upon it.

Sir George Lockhart affirms, assignees and other singular successors are not tied

in law to abide at the truth of the writ, but only that it was truly delivered to them; unless there were eminent presumptions of the assignee's accession. Some think, if the cedent be living, the assignee is also thus far obliged to produce him to abide at the truth of the deed; but not if he be deceased. See 14*th November*, 1678, *Arbuthnot* and *Lady Knox*.

IV. There was a discharge, bearing to be dated in 1674, and the blank is scored; *Quæritur*—If it will be null as *falsum in data*. See Craig, p. 156; see largely, *supra*, *George Home* and *Brown's* case in *November*, 1672, No. 375. The other offered to prove it was truly done in 1677. I think this is relevant and sufficient.

V. What if improbation be raised of a writ, and it was registrate, and the party has done his utmost diligence to get the principal, and cannot find it? *Quæritur*—If certification will be granted against it, if it bear not to have been registrate in the registers 1606 and 1622, and those other that were lost and cast away? For if it was registrate in these years no certification will be granted. I think the Clerk-Register and his servants should be liable for it, since he gave an extract of it; else his servants might for hire give up principal bonds. Where none will abide by a writ, it will be got improven; but, *quæritur*, May not the user and producer of it be punished, though for fear he passes from it. I think he should, if it was in his own name; if either he have assigned it, or charged on it, or otherwise used it; conform to the 22d act in 1621.

VI. In an improbation against writs as false, it is a good defence to say, I cannot produce the principals to you, because I offer me to prove they were given up and delivered to yourself upon transaction and payment.

VII.—Anent Exhibitions.

Some think it fit to libel exhibitions as largely as improbations, and leave it to the defender to restrict the pursuer's interest, as to writs granted by any of his predecessors to whom he may succeed *jure sanguinis*.

VIII.—Anent Summonses of Wakening and Transference.

Summons of wakenings and transferrings are permitted to be inrolled as of the date of the old process or summons; and so come in summarily and presently, to be called before many other processes in time raised before them.

IX.—Anent Actions of proving the Tenor.

On the 23d of July, 1673, in a suspension John Smart *contra* Sibilla Ewing and William Thomsone, vintner, her husband, the Lords found a decreet for proving the tenor of a bond, before the Sheriffs of Edinburgh, not warrantable, these actions only being competent before themselves, (see the act Parliament 1672, anent the regulations of the Session, act .;) and therefore turned the Sheriff's decreet into a libel; but allowed John Smart to fortify it by adducing farther witnesses than was formerly led, to adminiculate the tenor of the writ craved to be made up.

X.—Anent the requisite Number of Witnesses to Seasines.

It was inquired, If two witnesses inserted was a sufficient number in a seasine, seeing *locutio pluralis indefinita duorum numero contenta est; L.* 12, *D. de Testibus;* or if there must at least be four witnesses: as Craig requires, p. 182. (I have seen some Lords, in their own opinion, repel this nullity of a seasine's wanting four witnesses, and think that two witnesses are in law sufficient thereto.) The fourth act, Parliament 1584, speaks only of a lawful number of witnesses, and defines not how many. See the marginal laws and citations there. Only, our custom seems to require, *ad minimum,* four; because in all writs not subscribed by parties but by notaries, four witnesses, by the 80th act in 1579, are requisite. But that act relates only to writs which need the subscription of parties; and where they cannot do it, introduces the subscription of two notaries for them, in all matters of importance, as a solemnity to supply the parties' own subscription: but seasines are not of this kind, else they should need two notaries also. Which was, indeed, once required by an act of Parliament, but was afterwards abrogated and went in desuetude. In strict form, I think a seasine wanting four witnesses should be null.

XI.—Anent the Attestation of Seasines.

In the time of the English usurpation, the judges then, in a case of Sir John Scot's, found a seasine null that wanted the formal attest of the notary, "*Et ego vero.*" Yet, in some old Practicks, particularly in Hadington, *25th July,* 1623, *Lord Ramsay,* I remember the Lords have sustained them, because *in facto antiquo;* but in that practique of Hadington's I find the Lords did not sustain such a seasine for a sufficient title. *Vide supra, No.* 568, *9th June,* 1677, *Guthries; item, 23d December,* 1680, *Lamerton.*

XII.—Anent the Competition between the Master and the Tenant's Creditors.

A master, to whom two years' rent is owing, seizing upon his tenant's goods, must ascribe it to pay him his privileged year, for which the law gives him a tacit hypothec, and not the former year, in prejudice of the tenant's other creditors; beyond whom as to the preceding year he has no prelation. This resembles the *actio de peculio, de in rem verso, et actio tributoria,* in the Roman law. *Quatenus erat in peculio,* the master was preferred to all creditors; but, farther, *in aliis bonis,* he came in but *pro rata* with the rest.

Advocates' MS. No. 578, *folio* 286.

1677. *June.*

I.—Anent Abstracted Multures.

In a suspension raised by Powburne and Scotistoun, for their tenants, against Sir David Carnegie of Pittarrow's decreet of abstracted multures from his mill of Conveth; Sir George Lockhart thought, in regard there was a term assigned to prove

the quantities of the abstracted multures, and the same was offered to be proven by the defenders' oaths, and a day being taken by their advocate to produce them for that effect, they could not now be reponed to their oaths, the term being circumduced, and the decreet extracted. Yet, on the payment of the expense of the decreet, the Lords sometimes will repone them against such circumductions.

II.—Anent Assizes.

In the Sheriff-Court of Edinburgh, they try not bloods by an assize, but by probation of witnesses; and are both judges to the probation and relevancy themselves. And really the form by assizes is now superfluous, and it were better all were committed to the judge, and inquests were totally abolished, as they are in many cases wherein they took place of old; as Skeen, *verbo* Breve, tells. See Dury, *26th November*, 1633, *Lindsay*.

III.—Anent Escheat.

If one be denounced at the Market Cross, where his lands lie, or himself dwells, and there registrate, a relaxation at Edinburgh (the lands not lying within that Sheriffdom,) will not hinder the liferent escheat from falling. See the 75th act, Parliament 1579; see *alibi*, an observe, in a MS. little book, upon what denunciations escheat will follow, and what not.

IV.—Anent Removings.

Though one be not infeft, the time of a warning to remove used by him, yet if he infeft himself before the term, it sustains the warning. But I have heard some allege, that the Lords once found an infeftment taken after the term to which the warning was used, only before the raising the summons of removing, sufficient to validate the warning. Which were a strange practique. See Dury, *29th July*, 1625, *Earl of Winton* against *Tenants*. *Vide supra*, No. 574, § 9, [*June*, 1677.] *Vide* *19th February*, 1679, *Jack*.

V.—James Brown *against* Lord Arbuthnet.

In *anno* 1663, the following case fell to be debated. James Brown, advocate, having married one of the two heirs-portioners of Keith of Peattie, which two daughters had in their minority disponed these lands for a competent adequate price to the Lord Arbuthnet; yet James raises a reduction of the disposition, 1*mo*, because done by minors, pupils, before their age of 12, and who are presumed in law *nec nolle nec velle habere*; 2*do*, with consent of their mother as tutrix, who could not then be their tutrix, being remarried, *cum ad secundas convolasset nuptias*; 3*tio*, it wanted a decreet of a judge, finding the alienation necessary. Answered, they could never be reponed, because they could never qualify lesion, since the price was adequate and full, and *in rem versum*.

Arbuthnet, to compense this pursuit of James Brown's, he deals with the Earl of Marshall, of whom the lands of Petty held ward, (the said Keith being a cadet,) and obtains from him a gift of the heirs-portioners their ward and marriage; and pursuing for the liquidation of the avail, all the defence James Brown had, was, that

their father died in the king's service, being blown up at Dunglas, and so by act of Parliament in 1640, act 30, no marriage was due. ANSWERED, the said act is only temporary. *2do*, They were not *in procinctu et expeditione*, and so cannot claim this privilege. *3tio*, It was a casual accident, and not done by the enemy. *4to*, Peaty was neither an officer nor soldier in the army then, but merely present on another occasion,—courting a wife. *Vide* 21st *February*, 1671, in *Hadden's* case, anent being killed in the king's service; it is No. 137. *Item*, James Brown ALLEGED, the Earl of Marshall, superior, had consented to the marriage, and subscribed witness in the contract, and so no marriage due. REPLIED, *1mo*, Marshall was circumvened. *2do*, It was after he had gifted the casualty, and so was denuded. The Lords repelled the allegeance. See Stair's System mentioning this, *titulo* Superiority, *in fine, pagina mihi* 268.

This affair was not decided but agreed, and James Brown took the 8000 merks that remained in Arbuthnot's hand as his wife's part, and half of the price; and ratified the disposition.

VI.—ANENT TOCHER.

WHERE a tocher is promised and conditioned to be paid in a contract matrimonial, and the father-in-law payer, either of the same date or thereafter, takes from his son-in-law a discharge of it, as in *Hepburne* and *Seton's* case, in Dury, *15th January*, 1634; (*Vide infra*, No. 582, *Currie* and *Oliphant*. See *8th January*, 1679. *Arbuthnot* and *the Lady Knox*. See Antonii Fabri *Codex*, *libro* 5, *titulo* 9, *definitione* 11, *in notis*.) Or where a woman or her friends are induced to marry a man upon the sight of bonds given to the man, containing sums of money, by his friends, and whereof he has given either a discharge or backbond; so that the bond was merely given to deceive; as M'Corcadell's brother did with Mr James Mirk, in feinyieing his brother's subscription to a bond: (See *supra*, *July*, 1670, No. 98;) the Lords reject these pactions as fraudulent and disingenuous, *et contra fidem tabularum nuptialium*; as Sir George M'Keinzie, in his observes on the act of Parliament anent bankrupts, page 61, in the case of *Donald Fuller* and *Hendersone*, shews. Annæus Robertus, with a torrent of eloquence and learning, informs us, *cap. 2do, libri* 1, *rerum judicatarum*, they are reprobated by solemn decisions in France.

VII.—ANENT MESSENGERS.

JAMES DUMBAR, the messenger, is convened by one who had employed him to pay a debt, *super hoc medio*, that he undertook to apprehend such a man by a caption; that he had him in his custody and power, and yet dismissed him, and suffered him to escape; who ought to be as well liable as he who deforces a messenger, *et eximit debitorem ab officialis familia*. *Vide* Dury, *25th July*, 1633, *Mitchell* and *Law*; *vide supra*, *February*, 1673, No. 386. It was pretended, that the Lyon and his heralds, by the act, Parliament 1672, were judges *in prima instantia* to him. But I think that jurisdiction is not privative of the Lords.

VIII.—ANENT PRESUMPTIONS OF PAYMENT.

THREE consecutive discharges import liberation of all preceding years; but three

years discharged *uno ore*, in one discharge, does not; because three deliberate acts are such a pregnant and repeated deed, as oblivion can scarce be presumed in it: which may easily fall out and be huddled up in one act; for *actus geminatus* has privileges in law to enforce knowledge on the doer. Yet if a man has been in possession of lands for twenty years together, and pursues for a year before the twenty, (This was occasioned by Sir John Whytfoord of Milneton's charging William Martyn upon his tack. See the information of it beside me.) he will not be excluded on this presumption that he is paid of that year; for that were to introduce a vicennial twenty years prescription for such rents, which our law knows not. But what if he possessed for years before and years after, and crave a year in the middle *quid juris? annon extrema ibi probant media?* I think, in apprisings, it would; because they are obliged to do diligence, that con-creditors be not debarred and prejudged, or else tell what impedes them; but an annualrenter, who has got a locality, seems not to be so obliged.

IX.—Anent Feu-Duty.

In lands worth L.40 Scots by year, the feu-duty payable furth thereof being L.8 Scots, there being a liferenter on the land, the superior for twenty years together exacts no feu-duty, for personal respect he bears to the liferentrix, knowing it is *debitum fundi*, and any time, within forty years, he may poind the ground for them, and exact them; and, therefore, suffers the liferentrix to possess all. The heritor, who is fiar, or an appriser, observing this, finds it will, at the long run, absorb the value of the land, and evict the property, demands what course he shall take to obviate it. Either he may charge the superior to enter him, if he be an appriser or adjudger, and it is like he will suspend on the not-payment of the bygone feu-duties; or, since this is not so sure, he may raise a declarator against the superior and liferentrix, to hear and see it found and declared, that either he ought to give a discharge of all these feu-duties, or exact them of the liferentrix, or declare he shall not burden and affect the fee of the lands therewith after the liferentrix [her] decease, else it would give way to a fraudulent design to absorb the fee.

X.—Anent Jedges.

In a case of Dougall of Nunlands, Francis Kinloch, Dean of Guild of Edinburgh, having given a jedge of a cellar in Leith, the Lords, in *June* last, 1677, suspended the said decreet simply, as unjustly done, after visitation made by some of their number.

XI.—Anent Lands lying Run-rig.

Where lands lie run-rig, and belong to sundry proprietors, you will not get any one of them forced to divide except they please. What if it be in a commonty, or amongst heirs-portioners, who succeed to each fur *in solidum* only? *Concursu partes faciunt?* May not one provoke another *ad divisionem*, since *communio est discordiarum mater?* See Craig, *Feudorum*, pages 194 and 195. There was a process of division between Monteith of Caribber and Doctor Sibbald. *Vide supra*, *17th June*, 1670, *Watsone of Pathhead* and *his Feuars*. It is No. 20.

Advocates' MS. No. 579, *folio* 287.

1677. *June* 26. Anent a Base Seasine of Ward Lands.

It was inquired, if a base seasine of ward lands, taken on a mandate or precept of seasine, given by a party when he is *in lecto*, can import recognition? *Videtur quod non;* because the warrant of the seasine is null in law, being on death-bed; and Craig, *Feud.* p. 344, tells of a decision, by which the Lords found a seasine, null for want of registration, could not infer recognition. Yet I think the Lords would not decide thus now. See M'Keinzie's Pleadings, p. 58. *Vide infra*, No. 590. [*Grant* against *Mackenzie*, *6th July*, 1677.] Besides, neither want of registration, nor deeds *in lecto*, are such intrinsic nullities but they are valid till quarrelled. *Advocates' MS. No.* 580, § 3, *folio* 289.

1677. *June* 26. John Dicksone *against* Bessy Short.

One Bessy Short and her husband having granted a bond for a certain sum of money to one John Dicksone, tailor in the Potterrow of Edinburgh; many years after the husband's death, she, being charged to pay the sum, suspended and raised reduction on this ground, that the bond was *ipso jure* null, being granted by a woman clad with a husband, and could never affect her, being *tuta exceptione Senatus-consulti Velleiani*, but only her husband's representatives. Whereunto I answered for Dicksone, the charger, that she behoved still to be liable, notwithstanding her revocation, because she since her husband's decease has acknowledged the debt, and taken it upon her, and homologated and ratified the bond, in so far as she has paid sundry years annualrents of it since his death; and as a minor may preclude himself of the benefit of restitution *in integrum* against deeds done to his lesion in his minority, by ratifying the same either expressly or implicitly, by paying annualrent, (as has been decided,—See Dury, *penult. July*, 1630, *Johnstoun*,) so may a woman when she becomes a free person.

Replied,—There is a great disparity, for a minor's obligation is not *ipso jure* null, but a married woman's is; *et non-ens nequit ratificari, nam non datur cui accedat.*

Duplied,—The obligation of a minor wanting curators is *ipso jure* null, and yet he may ratify it.

This being taken to interlocutor, the Lords, before answer, ordained her to produce the discharges of the annualrents paid; to the effect they might advise and consider, *quo animo*, she paid it, whether *se obligandi* or *ex errore*, for *ignorantia juris in muliere est excusabilis, L. D. de juris et facti ignorantia;* and this in regard it was alleged, that what she had paid was out of mere simplicity and ignorance, not knowing she was not obliged.

Then the charger, *2do, et separatim*, answered, She ought still to be liable, because he offered him to prove the debt contained in the bond charged on was originally her own before the marriage, and that her husband only *pro interesse* granted this bond; and so she was *in lucro captando*, not *in damno vitando*. *3tio*, That she was executor or intromitter with her husband's goods.

Both thir were found relevant, *per se*, and referred to her oath; and she neither

compearing to depone, nor producing the discharges, the term was circumduced, and the letters found orderly proceeded.

For the weakness of homologations, *vide supra, November*, 1676, No. 508, § 4. See Craig, p. 305. *Advocates' MS. No.* 581, *folio* 289.

1677. *June* 26. The CREDITORS of PATRICK INGLIS of Eastbarnes *against* JOHN INGLIS of Cramond.

THERE was a large debate between the creditors of Mr Patrick Inglis of Eastbarnes and Mr John Inglis of Cramond, who had an infeftment of annualrent furth of these lands, yet the other creditors were preferred to him; the case must be inquired after. *Vide supra*, A large debate of the creditors and Mr Patrick against his mother in December 1671; it is No. 282.

Advocates' MS. No. 583, *folio* 289.

1677. *June.* The EARL of LOUTHIAN *against* the MASTER of BALMERINOCH and JOHN ELPHINSTON.

THE Earl of Louthian raised a reduction and declarator against the Master of Balmerinoch and John Elphinston, to hear and see it found and declared, that a bond, wherein the said John Elphinston's name was, for the master's behoof, was truly blank in the creditor's name and sum, and left by the pursuer's father in the hands of Sir Thomas Nicolsone of Carnock, advocate; and upon his decease was found amongst his papers by James Chalmers, then his servant, afterwards advocate, and taken out and delivered to the master, and filled up without any onerous cause; and therefore to be decerned to give it up. This was a reflecting conveyance if true, and like the case the town of Hamilton have with Robert Hendersone, for filling up in a blank bond 3000 merks instead of 500 merks. See the Information, *apud me.* Thir blanks are dangerous. *Advocates' MS. No.* 584, *folio* 289.

1677. *June.* ANENT *INDEBITI SOLUTIO.*

WHERE one pursued for repetition of money *indebite solutum, condictione indebiti*, it fell to be questioned whether the annualrents of the sum paid could be condicted, since they were *fructus et accessio principalis sortis*, and so should follow it. On the other hand, they were not paid, and so could not be repeated; their mother only was paid, and they are *fructus bona fide consumpti.* And thus Cujace, in his Paratitle *ad Tit. C. de privilegio fisci*, tells, where a privileged creditor retracts the payment the debtor by gratification had made to another less privileged creditor, *condictione indebiti*, he recovers it, but *sine usuris.* Yet our Lords, on the 5th

of July, 1677, found the intermediate annuals ought to be restored as well as the principal; only that they were due *ut damnum et interesse*. For the case of *condictio indebiti*, see at great length, *supra*, in *February*, 1673, *Ramsay* and *Robertsone*, No. 385.

In lege 15, *D. de Condictione indebiti, etiam accessiones veniunt.*

Advocates' MS. No. 585, *folio* 290.

1676 and 1677. The MINISTER of NIG *against* his PARISHIONERS.

1676. *December* 13.—MR RICHARD MAITLAND, minister at Nig, pursues Sir Jo. Forbes of Monymusk, Meinzies of Pitfoddells, &c. his parishioners, before the commission for kirks, for an augmentation of his stipend, the length of the act of Parliament. They say, the Bishop of Aberdeen had ordered all the ministers in his diocess whose stipends were under eight chalders of victual to pursue to get them made up. Among sundry defences, which see in the Information, this was one, That Monymusk's teinds could not be affected or burdened with any augmentation, because he had bought his teinds, and obtained them, on the resignation of the Marquis of Hamilton, (who was lord of erection of the abbacy of Arbroath, to which thir teinds belonged,) in 1618, heritably and irredeemably disponed to him, *cum decimis inclusis;* and therefore, having so onerously acquired them, they could not be clogged or destined so long as there was other free teinds unbought, and not in so favourable a case, in the parish. *2do*, They could not be affected at all, because we offered to prove that the lands of Monymusk, stock and teind, were an ecclesiastical feu of the said abbacy of Aberbrothick; (to which religious house they were vowed by King David, that sair saint to the Crown, when he went against Donald of the Isles, if he should return prosperous;) who being monks of the Cistercian order, their teinds, both by the canon law, cap. 10 and 34, *extra, de decimis*, and our law, (see Hadington's Index of Practicks, *verbo* Teinds, No. 17; see Stair's System, *Tit.* Of Teinds, § ; see Craig, *Feudorum*, p. 101, *in margine;* see Mornacii *Observationes ad L.* 16, *D. de Legibus*, p. 22,) are declared free of all burden. If that cloister were *Cistercians*, I cannot tell; some say, in their foundation they are so called; but in the list I have of all the monasteries in Scotland, they are called *Turonenses* or *Tironenses, quasi Tirones novitii;* see *Rosse's* View of all Religions. But if there be no other teinds, it were hard on this to defraud the church of that which is naturally their patrimony, as the teinds are called, act 10, Parliament 1567; but if there be any other teinds, they should be free and exemed.

I find now Arbroath was a convent of Benedictine monks, from the charters of Torrie; see a Compend of them. They are called Turonenses from the Benedictine Abbey of Marmoustier at Tours, which I saw.

Advocates' MS. No. 523, *folio* 270.

1677. *June.*—IN the action pursued before the Commission for Plantation of Kirks, mentioned *supra*, December 13, 1676, No. 523, at the instance of Mr Richard Maitland, minister of Nig, against Monymusk and others, for an augmentation of his stipend; I ALLEGED, It was none of the best characters of a minister to endanger Christian charity, and the breach of that spiritual union between him

and his flock, for 100 merks more stipend; that augmentations and prorogations were *correlata*; went *pari passu*; *uno posito ponitur et alterum, sublato uno tollitur et alterum*; that they were like the thing and its price; (see this enlarged in my Observations on the Act of Parliament in 1672, giving a new commission for valuation of teinds;) and, therefore, where prorogation could not take place, neither could an augmentation, because they could not remunerate and recompense; but here no prorogation was prestable, because they had the heritable and perpetual right of their teind; *ergo*, they could not be burdened with an augmentation.

2*do*, *Decimæ inclusæ*,* by the law of Scotland, have ever been freed from all burden of stipend, because they are not reputed to be teinds, but a part of the stock. See Craig, p. 102, who calls them *decimas garbales*; though that word also signifies parsonage teinds. See Stair's System, Titulo *Of Teinds*, § . And for proving the allegeance, I produced a charter granted by the Abbot and Convent of Arbroath in 1544, granting *feudum perpetuum decimarum garbalium* of the halflands of Torry. See a summary of the said charter, *alibi*.

Pitfoddels produced, for proving that his teinds were included also, a charter both of stock and teind, wherein his teinds were expressly designed *decimæ inclusæ*.

ALLEGED, 1*mo*, against Monymusk's charter, that it did not prove his teinds to be truly *decimæ inclusæ*, which are only such as were *nunquam antea a solo separatæ*, and are presumed to have been feued out before the Council of Lateran. But Monymusk's were not such; for in the narrative it was confessed they had been formerly under tack, *quæ locari prius solitæ sunt*. Next, they were actually separate from the stock, in so far as he had a separate charter for them. 3*tio*, They were not designed *inclusæ*, but only *garbales*. 4*to*, They were separate, in so far as they paid a distinct reddendo and duty, viz. 28 bolls of victual for them, which was an evident demonstration that they had been separately valued. And there was no other objection against Pitfoddell's charter *cum decimis inclusis*, for evincing that his teinds were not truly of the nature of these *decimæ inclusæ*, to which the law hath given such a special privilege and exemption,† but only this last. Monymusk's charter lay open to all the foresaid exceptions.

After many reasonings, the Commission, on the *25th of July*, 1677, gave him 270 merks of augmentation, and imposed it all upon Monymusk and Kirkhill, conform to their rentals in process: viz. 250 merks *per annum* on Monymusk, and 30 merks yearly on Kirkhill, reserving always to discuss the point of right before the Judge Ordinary, (*id est*, the Lords of Session;) at the discussing whereof, if it appear that Pitfoddell's right to his teinds is not truly of the nature of *decimæ inclusæ*, then he is to relieve them, *pro tanto*, and to bear a proportional part of the augmentation, conform to the rental of his lands in that parish produced in process.

This was a strange and extraordinary reservation, and reflected extremely on the knowledge of the members of the Commission, as not of that reach to determine what were truly *decimæ inclusæ* and what not, as the fifteen Lords can. It was the President's cue to suggilate the Bishops and to cut Commissary Monro, its clerk, short of all the benefit he could; and he seemed in his own opinion not to be con-

* Lands *cum decimis inclusis*, since the act of annexation in 1587, are not esteemed valid *decimæ inclusæ*, unless they were given out as *decimæ inclusæ* before the said act of annexation. See *February* 20, 1611, *Murray* contra *Maxwell*. See Sir George Lockhart's resolution anent the *decimæ inclusæ* beside me, upon the occasion of this debate. *Infra*, No. 593, [*July* 7, 1677,] *Minister of Prestonhaugh*.

† Anent the reasons of this exemption and freedom from teinds given to the Cistercian order, and the limitations thereof, see neatly set down by Thomas Fuller, in his Church History of Britain, in that part of it called The *History of the Abbeys in England*, p. 288.

vinced either that Pitfoddell's charter did truly contain *decimas inclusas*. It is not usual to bring decreets of the Commission to be recanvassed before the Session: though this is rather a reference of a hard kernel in law to them that are most used in breaking them. Yet I remember, on the *27th of January*, 1670, (*Vide* it *supra*, No. 111,) *M'Keinzie* contra *M'Keinzie*, Gosfuird sustained himself judge competent to a reduction of a decreet of the Lords of the Plat for Kirks, though the Advocate declined it. The truth is, it being a committee of Parliament, it is at least coördinate with the Session. See M'Keinzie's Criminals, part 2, titulo 3, Of the Jurisdiction of the Parliament, p. 366.

There are no *decimæ inclusæ* with us, but such as were so possessed, and holden, and reputed, before the 29th act, in 1587, annexing all the kirk-lands to the crown.*

As for the rights of kirk-lands, granted after March, 1558; (because then the Reformation prevailing, churchmen did wilfully delapidate their rents and benefices,) they are null, *ipso jure*, by the 88th act, Parliament 1564, and 7th act in 1584, unless they were confirmed by the King, who came in place of the Pope. See Craig, Feud. page 108.

In prosecution of the foresaid reservation, Monymusk has raised his process of declarator before the Session, against Pitfoddells, for bearing a proportional part of the augmentation, his teinds not being the privileged *decimæ inclusæ*. See the 12th of July 1678, [*Dictionary, p.* 15718,] where it is decided they are not *inclusæ*.

Advocates' MS. No. 586, *folio* 290.

1677. *June* 29. The ARCHBISHOP of GLASGOW *against* TWO COMMISSARY CLERKS of PEEBLES.

DOCTOR BURNET, now Archbishop of Glasgow, pursues two commissary clerks of Peebles, for putting them from their place.

ALLEGED, They cannot be removed, because they possess by virtue of a gift from Robert Leighton, when he governed that diocess.

REPLIED, That gift could not defend them, because it was *a non habente potestatem*, he never being Archbishop of Glasgow, in so far as he was never legally translated from Dumblaine to Glasgow, as the canons require. (See the form of the translation marked by me *alibi* from the service book, in June 1677, on the translating of Mr Murdoch M'Keinzie, from Moray to Orkney.) 2*do*, the conjoining of two in one office, and to the longest liver, is unlawful, and not to be permitted in any but proprietors; else administrators of bishoprics may, by such tailyies, survivances, and reversions, forestal all the profit of places for an age to come, and prejudge his successor in the place: which is most unreasonable, for if he may conjoin two, then he may put in six, viz. the father, son, and grandchild, or brother, and so enhance all for fifty or sixty years to come.

DUPLIED, By our law translations are not absolutely necessary; see act 1, in 1617; that it is but a Popish nicety, which can never be obtruded against so material equity, where they are invested in a place by one who had a putative title, and

* Fishings, in many places, pay no teind; for *decimæ minores sunt locales, et debentur tantum secundem consuetudinem*. Multures have also been found free of teind; and in a late debate anent the teinds of Tulloch-mill, the Lords sustained the whole rental of the mill thereof to be free of teind, without respect to the mill-lands or mill-croft.

the King's call, and was in actual possession, and holden and reputed Archbishop; *Vide L. 3, Barbarius Philippus, D. de Officio Prætoris;* and they were *in bona fide*, to take a right from him. As for the conjoining, custom has made the same lawful, there being nothing more universal; as old Sir David Falconer of Glenfarquhar and his son Sir David, were conjunct commissaries of Edinburgh; Mr Henry Hay, clerk to that commissariat, had got the place also continued on his son; Sir William Purves had done the same with his office of solicitor to his Majesty; and the Lyon had the gift of that office to himself and his son; and Mr William Ramsay, and Mr James Rocheid, were conjunct clerks of Edinburgh.

TRIPLIED, That any canonist who understood anything of the investiture of the clergy in church benefices, would confess that translation was absolutely necessary to give him a right to the benefice *ad quem;* for they go upon two grounds. 1*mo*, They account it *spirituale matrimonium* between the bishop and his church: now the marriage knot cannot be dissolved till he be transferred. 2*do*, In imitation of the personal rights in the feudal law, their *breve testamentum*, or charter, and their *investitura et inductio in possessionem*, the canons have introduced presentation, collation, and institution; and where one is transplanted, then the translation is his new investiture and induction unto the possession; and without that they acknowledge no right in his person, neither to perform spiritual offices within that diocese, or to intromit with the temporality and rents. See *Tit. de translatione clericorum in decretalibus, and* Lancelot's *Institutiones Canonicæ:* see Dynus's Commentary *ad Regulam* 1 *Juris Canonici*, and my summary of him. *Vide infra, num.* 625, [27*th July*, 1677, *Duke of York against the Earl of Argyle.*] See the like question in Joannes Imbertus his *Institutiones Forenses, libro* 1, *cap.* 16. *pag.* 69.

The Lords sustained the clerks their conjunct gifts, in respect of the custom to give the survivance of places, and repelled all the reasons of declarator and reduction against the same. *Advocates' MS. No.* 588, *folio* 291.

1677. *July.* GRANT *against* M'KEINZIE.

A CHARTER being granted by the Marquis of Douglas, of the lands of Logie, to be holden ward, yet bearing a licence and faculty to grant subinfeudations of it; the vassal having given out a part of the lands to be holden blench; whereupon it being ALLEGED the lands were fallen in recognition, and they defending against it upon the foresaid licence:

The Lords found, it gave no power to feu, but according to law; (besides blench is not feu;) and it could not have been feued under the retoured duty, since the act of Parliament in 1606: yet they restricted the recognition, because of the probable mistake to the composition, viz. the year's duty paid to the superior. *Vide supra*, 1669, *Pitreichy* and *Geicht, November* 1676, *numero* 508, § 6; *item numero* 580, § 3, [*November* 1676.] [26*th June* 1677, *Birnies* against *Moray.*]

Advocates' MS. No. 590, *folio* 291.

1677. *July* 7. MISTRESS JEAN GRAY *contra* SIR ARCHIBALD PRIMROISE.

THE Register's last lady puts 2000 merks in Ker of Moriston's hand, and takes bond in David Boyd's name to her own behoof; thereafter takes a blank assignation from Boyd; and a little before she died, by a paper under her hand, declares she wills that her son Archibald's name be filled up in the assignation. After her death, the Grays coming by the assignation, they fill up Mistress Jean's name in it.

The Register, in 1670, intents process against her, founded on his lady's destination and nomination, and that it was presumed to be his money. Mistress Jean on that, comes and gives him back both the assignation and bond, and he uplifts the money. Now, since his advancement, or rather degradation, Mistress Jean raises a summons against him, of declarator, that the bond was extorted by concussion, through his power that he then had; and she, through his boasts and threats, knowing his bloody, malicious, and vindictive humour, was forced to give it up. Much debate was upon the qualifications of the concussion, as irrelevant within the town of Edinburgh, the seat of justice, where she needed not be frighted. It might have been credible if it had been done in the Highlands. Yet *minor metus* is required towards the forcing a woman than a man, as to whom it must be *talis que cadere potest in constantem virum*; See Dury, 1632, *Cassie* and *Fleeming*.

They were to have the Lords' answer on the relevancy. But Sir Archibald, considering it would but blaze his name where he was not loved, therefore quietly found the libel relevant of consent, being assured he had not used such indirect methods.

This process was managed by Sir Jo. Dalr. with much bitterness. But he and his father would do well to consider, if concussion be once sustained, how their friends, who have got decreets in their time, have reason to fear the same measure on a change: *nec lex est justior ulla, quam necis artifices arte perire sua; Quod quisque juris in alterum statuerit, ut ipse eodem utatur.* See *alibi* more of this just retribution. See M'Keinzie's Pleadings, page 183, and Seneca there. They will do well not to lay preparatives and foundations against themselves, but use their power moderately. *Vide Tit. D. de Concussione*, and the lawyers on it; *vide infra*, 1*st August* 1677, *Master of Cathcart, numero* 634.

Advocates' MS. No. 592, *folio* 291.

1676, and 1677. The PARSON of PRESTONHAUCH *against* RAMSAY, &c. his PARISHIONERS.

1676. *November 28th.*—MR GEORGE SHEILL, Parson of Prestonhauch, pursues Sir A. Ramsay of Waughton, and his other parishioners, for the parsonage and vicarage teinds.

The defence as to the parsonage was upon standing tacks, &c. which see in the informations beside me. As to the vicarage, it was ALLEGED absolvitor, because they have never, at least not these forty years past, been in use of payment of any other small teinds, but only for wool and lamb.

ANSWERED, though use and wont regulates the possession of teinds, being various and local, yet he offered him to prove he or his predecessors had possessed all the several species of small teinds, from one or other of the heritors or tenants in the parish; which must be sufficient to import an obligement upon the other heritors, being *obligatio individua.* See the reply to this fully in the information.

This went to the Lords' answer; who found the defence of immunity by the space of forty years relevant, and that the incumbent's possession could only tie the payers, and not the other heritors; and sustained the use of payment of such quantities as were paid preceding the citation in this cause, to import the continuance of the payment of the same in time coming; and admitted the minister likewise to prove possession. See more of this *infra*, No. 593, in July 1677.

This restricting of the payment of vicarage only to the payers, Sir George Lockhart called a great strain of law, and incongruous to the principles of it.

Advocates' MS. No. 510, folio 267.

1677. *July 7.*—In the action pursued by the minister of Prestonhauch, against Sir A. Ramsay, and other his parishioners, mentioned *supra*, in November 1676, No. 510; in obedience to the interlocutors, having produced tacks of the parsonage teinds, for sundry 19 years yet to run; and for proving the use and wont of the vicarage, probation having been led by both parties, this day the tacks and depositions came to be advised.

It was OBJECTED by the minister's advocates against our tacks, that they were null by the 200th act, Parliament 1594, and the 4th act, in 1617, declaring all tacks set by beneficed persons without consent of the patron longer than for their lifetimes and three years thereafter, null. And this was such, being set in 1609, without the consent of Buccleuch then patron. *2do*, It contained a conversion of victual into money, viz. setting a price at a merk the boll; which is a species of delapidation, and prohibited by the 11th act, in 1585.*

Whereunto, it was ANSWERED that, *esto* these were nullities, (which is denied,) yet the tack could not be now quarrelled thereupon, because they were prescribed, never being questioned as null within the space of forty years, it being now sixty-seven years since their date.

REPLIED,—The 12th act in 1617 anent prescription of rights, seems only to speak of real rights of lands, and not of tacks of teinds.† *2do*, It cannot extend to any but such as are proprietors: not to incumbents and administrators, whereof one for personal respects, may suffer the great prescription to run, as particularly in this case. Mr John Dalzeel was 50 years altogether minister at this kirk, and he not quarrelling it, it is nowise just that his silence or connivance should prejudge the place or his successors, who were not *valentes agere*, and so prescription could not run against them.

DUPLIED,—The act of Parliament was opponed, which was general, *et ubi lex non distinguit nec nos;* that it was the great fence and bulwark to all our properties;

* See the epitome of Sir D. Carnegie of Pittarrow's decreet for abstraction of mill multures, elsewhere.

† *Vide* act 21, Parliament 1649, where nothing doted to pious uses can prescribe; and by the Roman law, *centenaria præscriptio* was requisite, *contra Ecclesiam Romanam*; *Novella nona.* Dury, *7th December*, 1633, *Church of Abersheldor and Gowrie. Infra, July*, 1677, *No.* 631. *Vide Novellam* 111, *et* 131. See *20th of March*, 1683, *Bishop of the Isles.*

that to scan it nicely, or loose a pin, were as dangerous as to reverse acts of indemnity.

The Lords, after some demur, sustained the answer of prescription, and found the tack could not be now quarrelled after 40 years, for lack of the patron's consent.

The minister offered to prove interruption within the 40 years, to take off our prescription. It was craved he might condescend. The Lords found his reply of interruption relevant, and assigned him a day for proving thereof.

Then we entered to debate, that, *esto* he should prevail in proving interruption, yet we behoved to be assoilyied from the pretended nullity of the tack, for want of the patron's consent; because the foresaid acts of Parliament prohibiting such tacks, *non procedunt annullando actum, sed adjiciendo aliam pœnam.* See Vinnius, *Quæstionum Selectarum Illustrium, lib.* 1, *Quæst.*1; see Dury, *9th November*, 1624, *Mr Thomas Hope* and *his Minister*, and the lawyers cited there; see our information. *Vide* Bartolum, *ad L.*20, *act Prætor. D. de Novi Operis Nuntiatione, Num.* 3. But the President stopped it, because being a point *in jure*, after they saw what was the event of the minister's probation of interruption, they could hear it any time: and it was most rational to reserve it, and lay it over till that time; because if the minister prove not legal interruptions, there will be no need of debating these points.

As to the probation anent the vicarage-teinds, the Lords, at much leisure, having read the long depositions of the witnesses taken for both parties, found the Mains of Waughton liable for 24 shillings, as the price of each teind-lamb, preceding the term of , at which time this action was intented; as also, find Waughton, Houston, Fantasy, Myreside, Smeiton, and Prestonkirk, liable in payment of teind-wool, teind-lamb, teind-greises, and cheese, or 18 shillings for the price of ilk teind-lamb, and 8 pennies of ilk fleece of wool; and that Martle is liable for teind-wool, lamb, and greises; and that Linton, Eistforton, &c. and all the lands within that parish, are liable in teind-wool, lamb, and greises, except Overhailles and Patrick Temple's lands, which have hitherto only been in use to pay teind-wool and lamb, and excepting any other lands that are possessed *cum decimis inclusis*, or are Temple-lands or Cistercian, or otherwise privileged, and so simply free; and decern each of them to pay the respective species foresaid of small teinds, *ipsa corpora*, since the entering of the summons, and in all time coming; as also, to pay to the minister the tack-duties respective contained in their standing tacks of the parsonage-teinds produced. *Vide supra*, No. 586, *Minister of Nig*, [*June*, 1677.]

What are accounted vicarage? See Hadington, 19*th January* 1611, *Bailie of Monkland.* *Advocates' MS. No.* 593, *folio* 291.

1677. *July* 7. GAIRDNER *against* TENNENT.

ONE called Tennent, being charged by Gairdner on a bond, suspends on this reason, that the bond was elicited from him, by taking him in, and drinking him drunk.

REPLIED,—*Non relevat*, since *ebrius* is *duplici pœna afficiendus, secundum Pittacum; et sibi imputet*; and it was not so profound as to rob him of all use of his rea-

son; see Matheus and M'Keinzie in their Criminals, as to deeds done *ab ebriis*; and that we have no reduction of deeds done in drink, by our law.

Forret refused to sustain the reason. Yet it deserves to be considered: for if I can reduce a deed upon fraud and circumvention, can there be a more pregnant qualification of circumvention than to drink one senseless, and then cheat them? which is not to be tolerated nor encouraged by denying remedies against it. See Dury, *5 December* 1626, *Shaw* and *Balfour*; where drunkenness, with not being read, is sustained to take away a discharge; and Craig's Disposition to Pittarrow reduced, *ex capite ebrietatis*, in Parliament 1661; *vide supra*, [Vol. II. page 290.]

Advocates' MS. No. 594, *folio* 292.

1677. *July* 7. The LAIRDS of CONGILTON, BEINSTON, and GOURLAY-BANK, competing.

IN the mutual declarators of property, pasturage, and commonty, pursued by the Lairds of Congilton, Beinston, and Gourlay-bank, against one another, the Lords having advised the commission reported, with the haill depositions taken thereon, Congilton gained the haill points of it against the other two. In this cause, there fell a great debate about the vulgar appellation of a piece land wrong designed.

Advocates' MS. No. 595, *folio* 292.

1677. *July* 10. WALTER YOUNG *against* JAMES WILSONE, &c.

IN an action of Walter Young, the son, against James Wilsone and sundry others, the Lords finding that James Duncan, agent in the cause, and formerly servant to Sir Andrew Birny, had forged an execution of the summons, and thereon stolen furth a decreet against sundry pretended debtors; they made a most strict act of Sederunt, (see my Collection of these acts,) against all indorsations on summonses in time coming; declaring, they will not only find them null, though they be only for the first diet, but also punish the formers thereof. See M'Keinzie's Observes on the act of Parliament 1621, against bankrupts.

Advocates' MS. No. 597, *folio* 292.

1677. *July* 10. The EARL of ROXBURGH *against* JAMES HAMILTON.

THE Lords having advised the probation in the action between the Earl of Roxburgh and James Hamilton, merchant, they found the probation led by James anent the insufficiency of the bear offered to him, more pregnant than the Earl's probation, and so assoilyied him from so much of it. *Vide infra, July*, 1677, *Sir A. Ramsay* against *William Auchinleck*, No. 623.

Advocates' MS. No. 598, *folio* 293.

1677. *July* 11. The INCORPORATION of TAILORS of EDINBURGH *against* LITLEJOHN'S CHILDREN and their TUTORS.

THOMAS LITLEJOHN having left a legacy of 500 merks to the trade and incorporation of the tailors of Edinburgh, they pursue his children, as executors, &c. with their tutors and curators, for payment, before the Commissaries of Edinburgh, and obtain a decreet: which thereafter they suspend on thir two reasons.—1*mo*, That they were confirmed executors-creditors to their father, on their bonds of provision and mother's contract of marriage, and so were not liable to pay legacies. 2*do*, Andrew Litlejohn, the tutor, craved preference as to his legacy of L.1000.

ANSWERED to the *first*,—The oldest son behoved to be liable, for he accepted of a disposition of his father's haill estate, with the burden of debts and legacies. *Vide supra, No.* 524, *Catharine Mitchell's* case, (*December* 14, 1676.) *As to the second*, theirs had a privilege, being *ad pias causas*, for maintenance of their poor. 2*do*, He was *in mala fide* to accept a legacy, being a witness in the testament, and tutor, especially so considerable a sum: *Nam qui adscribit sibi legatum in testamento, non tantum amittit legatum, sed et punitur ut falsarius.* See Mercier's *Remarques du Droit François, pag.* 193; see Cujace *in Paratitlo C. De his qui sibi ascribunt in testamentis*; see the information of this cause.

Reidfuird repelled the reasons of suspension, and found the letters orderly proceeded. *Advocates' MS. No.* 599, *folio* 293.

1677. *July* 11. ANENT MINISTERS' STIPENDS.

MINISTERS' stipends were found to prescribe *quoad modum probandi*, if they were not pursued for within five years: which is conform to the 9th act of the Parliament 1669; which part of the act has hitherto been little adverted to, or proponed on. *Advocates' MS. No.* 600, *folio* 293.

1677. *July* 11. ANENT REFERENCES TO OATH.

THE Lords, by an act, declared, where a person referred a debt, or a reason of suspension or defence to a party's oath, and he simply denied it, the referrer, upon a bill given in to the Lords, should get L.40 Scots modified to him, *tanquam pœna temere litigantis.* Whereupon there were sundry bills given in, the said Session, and the Lords decerned L.40 accordingly. *Vide supra, 4th January* 1677, No. 528, § 4, How a process is to be proven calumnious.

Advocates' MS. No. 602, *folio* 293.

1677. *July* 12. JEAN DOLBY and PATRICK LAUDER *against* WILLIAM HOG.

IN the case of Patrick Lauder and Jean Doby, his spouse, and William Hog, her son, the Lords found, where a party had given a bond obliging himself to submit, it was equivalent to a submission; as an obligement to discharge, if it be simple, is a discharge upon the matter; only, in regard the year was expired, (and indefinite or blank submissions in construction of law stand only for a year,) after the date of the bond, and the woman submitter was now, *medio tempore*, clad with a husband, and one of the parties arbiters was dead, (in whom, *eligitur industria personæ*,) they found the bond to submit could not bind, because it could not now take effect.

The said Hog having also raised reductions of the said Jean her decreet of adjudication, proceeding on the provision and clause of conquest in her contract matrimonial; see seven or eight reasons of reduction in the information beside me, with answers thereto. I shall only mention one, viz. that the decreet was null andwithout probation, because it did not prove the time of her husband's decease.

REPLIED.—Though [she] might be admitted *hoc loco* to prove it yet, to fortify her decreet, (see Stair's Decisions, *November* 29, 1662, *Somervell* and *Newton*:) yet she needed not, because having libelled a definite time, viz. the month and year when he died, and there being compearance, and that time not denied, [she] was not obliged to prove any more than what they put [her] to prove, and, consequently, was liberated from that. Which was found relevant.

Upon another reason in this reduction, viz. a woman being provided to the liferent of a sum for her jointure, and likewise to the liferent of the conquest, if the most of what her husband leaves was conquest, and she crave the liferent of that *primo loco*, and would cast over the other provision to be supplied by the heir out of the stock and fee: The Lords find this calculation ought not to be suffered; but, *primo loco*, the liferent of that sum must be made up to her, and then she may claim the liferent of the remanent as conquest; for conquest is only *deducto ære alieno*; now the former provision is a debt, and so to be defaulked.

See M'Keinzie's Observes on the Act of Parliament 1621, p. 74.

Advocates' MS. No. 603, *folio* 293.

1677. *July* 12. JAMES SOMERVELL *against* WATSONE of Damhead's CREDITORS.

JAMES SOMERVELL, usher to the Exchequer, gave in a bill to the Lords thereof, shewing that he was donatar to Watsone of Damhead's escheat, and sundry creditors had poinded the escheat goods, and therefore craved their warrant to force redelivery. This, as illegal and arbitrary, was denied, he not so much as having declared his gift generally, and their poinding being *authore prætore*.

I remember, in *November*, 1676, in the case of *Grant* and *Grant*, one who was convened as vitious intromitter was assoilyied, because he was donatar to the defunct's escheat, though the gift was posterior to his intromission, and was never de-

clared. Which seems not to want its scruple. This I read in the President's collection of decisions. *Advocates' MS. No.* 604, *folio* 293.

1677. *July.*

THE Lords made an act discharging the clerks to give up the principal minutes to the parties, or their advocates; because thereby the extracting of acts is ofttimes much retarded. *Advocates' MS. No.* 605, *folio* 293.

1677. *July* 17.

THE Lords were this day upon an act of Sederunt, that the clerks to the bills should be liable for the responsality of the cautioners received, and that *in subsidium.* See this debate in another paper-book.

2*do*, That bills of suspension within eight days after presenting, if they be not past, or an act in them, the charger shall, *ipso facto*, have liberty to proceed in his diligence without any more.

See my summary of the Sederunt-books.

Advocates' MS. No. 606, *folio* 293.

1677. *July* 17. M'KEINZIE of Suddy *against* ROSSE of Kilraick.

A WIFE called Margaret Andersone, being liferentrix of lands, does, with consent of her husband, assign and dispone her liferent right in favours of another person; he transfers it to a third, and a third to a fourth. This fourth grants a backbond to the husband, declaring, that for onerous causes, the right of the liferent is the husband's.

This was quarrelled, as *donatio inter virum et uxorem*, in construction and interpretation of law, though done *per interpositam personam*, and so, as revocable *tacite vel expresse*, since *quod non licet directo, nec per obliquos licebit cuniculos.*

ANSWERED,—It had gone through many hands, and past to singular successors. 2*do*, Its returning to the husband made it not a *donatio*; because *ab initio*, (which is ever to be attended,) it was not a donation flowing from the wife to the husband, *stante matrimonio*, but was come in his person, for some new onerous cause.

The Lords found the conveyance was to be presumed to have been merely done *animo fraudandi legem*; and wherever appears a design *fraudem legi facere, ejusque mentem circumvenire*, there it annuls the deed; and found it was *vitium reale* that followed and affected it *per mille manus*; and so declared it to be a donation and revocable.

They had decided the same thing formerly in *Wolmet's case*, in 1663. See *Alex-*

ander Arbuthnet's information contra *Colonel Hary Barclay*; see *Lutfuit* and *Corser's* information. *Vide supra, June* 26, 1678, [*Birnies* against *Morray,*] *No.* 580. See Schotani *Examen Juridicum, ad Tit. de Donationibus inter virum et uxorem.* See the same decided in Dury, *December* 21, 1638, *Craigmillar* contra *Chalmers.* See Craig, pag. 97 and 341. *Advocates' MS. No.* 607, *folio* 293.

1677. *July* 21. SIR ROBERT PRESTON'S RELICT *against* His ELDEST SON.

IN a cause of Bothwell, relict of Sir Robert Preston, against Sir Robert's eldest son: Forret inclined that though a bond of provision by a father to his children, was not a delivered evident in the father's lifetime; yet he being tutor and administrator of law to his own bairns, might keep their writs, and that could not hinder execution on them after his decease, though they bore no clause dispensing with the not delivery, and that these bairns were provided to 10,000 merks already, by their mother's contract of marriage, and this was an additional provision of 10,000 merks more.

See Dury, 11*th November* 1624, *Wallace of Ellersly.*

Advocates' MS. No. 611, *folio* 294

1677. *July* 21. BRUCE of Bordy *against* KEIRIE, and CALLANDER.

BRUCE of Bordy pursues one Keirie, chamberlain to the Earl of Mar, and one Callander, for a spulyie and ejection: ALLEGING, that they entered to the land *privata authoritate,* and not *via juris; et non est singulis concedendum quod per prætorem seu magistratum expediri debeat, L.* 176, *D. de Regulis Juris.*

ANSWERED, Bordy sold them the seed, *et omnia sua instrumenta rustica agriculturæ: quorsum hoc et cui bono,* if it was not an allowance to possess the land, which he could not do himself, being then in prison? and this being *presumptio juris,* must be sufficient to liberate them, since *causa quævis, etiam fatua,* is good enough to purge a spuilyie, &c.—*Infra, No.* 642, [Historical volume, *Young* against *Hope* 3*d October,* 1677.] *Advocates' MS. No.* 612, *folio* 294.

1677. *July* 21. COLONEL HENRY BARCLAY *against* ALEXANDER ARBUTHNOT of Knox.

ALEXANDER ARBUTHNOT of Knox, being charged upon a bond granted by him to Colonel Hary Barclay, to make the evidents of the lands of Knox forthcoming, when he should necessarily have to do therewith; suspended on this reason, that the colonel sought them merely out of malice to vex the suspender, and it may be to destroy the writs; and they could not condescend on any rational

or necessary use they had to do with the writs, when they were exhibited, as the bond required. They jangled long that they needed not, and Alexander pursuing a declarator of recognition, they had cause to crave a sight of the writs to know how the lands held.

The Lords found they behoved to condescend on some use: and as to that pretence of the declarator, we answered,—Alexander was necessitated to take the gift of that recognition; because being incurred by the colonel's own deed, he was aiming to have been made donatar thereto, and so have swept away the estate from Alexander; in respect whereof, he could never doubt but there was a recognition committed. *Advocates' MS. No.* 613, *folio* 294.

1677. *February* 20, *and July* 12. The EARL of ROTHES *against* LORD MELVILLE, and his SECOND SON.

February 20.—THIS day the Earl of Rothes, Chancellor, (Sir William Bruce's name is in the gift of nonentry,) gained his action against my Lord Melville and his second son. The Lords found Melvill's son could not be served heir of tailyie to the last Countess of Leven, during the possibility of a second son of my Lord Chancellor's body, (for the devil must bide his day,) and prefer Sir William Bruce's gift.

Thereafter, on the 26*th of February*, on a bill given in by Melville, and a debate following thereon, representing that they could not prefer Sir William's gift, since there was not a *verus contradictor in campo*, without which, the process would be utterly null and void; Melville was not, for he had no member of the tailyie; his son was minor, and might say next day his father had collused, and so *res inter alios acta* could not prejudge him.* The Chancellor had taken much pains to have out his decreet, extracted, (the 24 hours after the reading in the minute book, and 12 hours after the giving out of the scroll to the adverse party being past,) before this bill came in, but Mr Alexander Gibsone, clerk, with much rudeness and passion refused it; undoubtedly he was authorised so to do by the President, else one so timorous as he had not done it. However, the Lords this day take back what they gave, and some of them who were clear for him the time before, as Argyle, &c. change on him. Halton stood firm to him. The Lords resolved to leave a buckle loose for overawing him and keeping him quiet, betwixt and June; they reserved always to debate upon the gifts in the special declarator, (which they minded to intent before the sheriffs where the lands lie,) whether it be a nonentry in the King's hands, or if it be lying *in hæreditate jacente*. Which is a most ridiculous fancy, there being no *hæreditas jacens* known by the law of Scotland, but in favours of creditors when apparent heirs renounce; and there is none in the feudal law, where the King must always have a vassal. He was forced to take his decreet with this clog at the tail of it, and extract it with that quality, because they would not give it him otherwise. They aim at a sequestration of the rents in a third party's hands during the dependance, and possibility of a second son, and Melvill's second son's seclusion;

* *Lex* 80, § 1, *D. De acquirenda et amittenda hæreditate* makes for this case. *Proximus hæres a partu qui in utero esse creditur hæreditatem adire nequit quamdiu incertum est an nascatur nascive possit qui in utero est.* See Bronchorstius *ad legem* 187 *D. De Regulis Juris.*

which resolves in a clear fidei-commisse. The way to shun such an inconvenient of the pendency and vacancy of a fee for want of a vassal, where a possible heir not yet existing, is designed to be provided to lands, is and must be hereafter; if a father have a prodigal son, (as was in Eglington's estate,) or a man a brother in whom he will not trust the fee of his estate, but only make them a liferenter, but yet would settle it upon the children of his body, which are only possible, and not as yet existent, lest caducity be incurred, a certain person must be infeft to the behoof, and for the use of the said son *in spe et possibilitate*, like the English feoffees and trustees. See Littleton's Feus, and Cook's Comment on him. See *28th February*, 1679. The only hazard and inconvenience of this is, that you must let the fee run the risk of all the delinquencies of the trustee, that is to say, of the superior's casualities by ward, marriage, non-entry, liferent-escheat, forefaulture: yea, though the infeftment should bear that express quality, that his commission of crimes or contumacy, should not prejudge the person for whose utility the fidei-commisse is made, it would not bind the superior, nor be esteemed as *pactum validum*.

To resume the arguments were used in the debate, would swell to a great bulk, and were unnecessary, especially since they may be read in the information beside me. But I shall only touch at some few remarks and observes of my own on the affair. It is a principle in law, and to be read in Bartholomæi Socini *Fallentiæ juris, regula* 1. *Ablativi absolute positi inducunt conditionem, et pendente conditione non debetur legatum relictum*; now the formula by which our tailyies are conceived, *quibus deficientibus*, Quhilks failyieing, are *ablativi absolute positi*; *ergo*, they make a condition, till which be purified nothing is due to Melvill's son. *2do, per legem* 11 *D. de testamentaria tutela, Quamdiu speratur tutor testamentarius, non est locus dativo*; *ergo quamdiu* there is *spes* of the nearer member of the tailyie, of my Lord Chancellor's body, *non est locus substituto*. *3tio, in edicto Carboniano, Si quæstio fiat pupillo de statu an ingenuus necne, mittitur tamen in possessionem, dilata cognitione ingenuitatis usque ad pubertatem*: And with us by act in 1503, a widow seeking her dowry (terce,) and questioned as not lawful wife, is, during the dependance of the plea and trial, put in possession of her jointure *provisionaliter*; *ergo*, so should the Chancellor during the possibility. On the other hand, for Melvill's second son; it is an ordinary brocard of law, *semel hæres, semper hæres; semel exclusus in substitutionibus, semper censetur exclusus.*—Vinnius, the most learned of all the late writers, *ad parag. nonum Institutionum de hæredibus instituendis, numero 5to; item ad titulum de substitutione vulgari*; who tells that *istæ subtilitates juris civilis*, that *hæres non potest institui ex die vel ad diem, recesserunt ab usu et moribus plærarumque gentium*, (which makes for the Chancellor's case;) *ergo*, if the Chancellor were admitted in hopes of the possibillity. Melvill's son could never come in upon the extinction, *quia non datur hæres temporalis*. See Craig, *feud. pag. de successione quadam possibilitate successionis extincta*; see in another paper beside me, this case of the tailyie of Levin stated and argued, and if *dominium* (*feudum*) can be *in pendente*; see Stair's system, in the case of *Major Bannatyne* and *Weir of Blaickwood*, debated in 1647; *item*, of late, a case, wherein my Lord Halten was concerned, anent the secluding the possible heir of tailyie, and preferring the existing; but it was done of consent and by collusion. *2do*, A son dies who was infeft in lands; the father succeeds and will be retoured his nearest lawful heir, though there be a nearer in possibillity, viz. the defunct's brethren and children to the father, who may be gotten, and will seclude; and he may enter while there is hope of them. The true fortress and refuge of Melvill's advocates

was to deny it could in law be pactioned, that an heir not existing should make the institution hang in the air till the possibillity expired; but when the fee opened, and he not extant, then the nearest in being ought to succeed. *Item*, arguments may be drawn *a jure postliminii et fictione legis Corneliæ;* even so here, let the eventual condition be expected and retrotracted when it exists: but all thir topical parallels are twenty miles wide, and halt *ambobus pedibus.* See Hermannus Vulteius, *de Feudis, lib.* 1, *cap.* 7, *No.* 68, *et seq. pag.* 152, *et seq.; item cap.* 9, *No.* 78, *pagina* 357. *An casus possibilis, fortuitus, dubius, vel incertus, sit expectandus;* see Bartolus, *ad Novellam* 2*dam, cap. Hoc autem,* 2*do; numero* 6, *de non eligendo,* 2*do, Nubentes, pagina illi* 120. *Hæres in herba* is a Latin proverb; see it in Erasmus his *Epitome Adagiorum, verbo Eventus Incertus, pagina* 287. *Vide* on this subject, *Legem* 17 *D. de Vulgari Substitutione; L.* 127 *D. de Legatis, primo; L.* 10 *D. de Hæredibus Instituendis; L.* 3 *C. Quamdiu; L.* 68, *L.* 83, *D. de Acquirenda et Amittenda Hæreditate, ibique* Bartolus. And yet most of thir laws speak *in postumo; quæ est possibilitas proxima,* and does not meet the Chancellor's case. *Vide Legem ab Avo,* 102 *D. de conditionibus et demonstrationibus; Quos primo nominavit majore pietatis affectu amâsse præsumitur;* and so the Earl of Levin must be supposed to have preferred the Chancellor's second son, in his affection, before Melvill's, and not intended it for a mere empty compliment, since the Chancellor the time of the tailyie had no sons, nor any great probability of them. *Etiam cuivis incertæ personæ hæreditas jure novo relinqui potest; L. unica C. de incertis personis; ibique Cujacius, in paratitlo.* As to conditions, one Philibertus Bruxelius (because born at Brussells) hath written a large treatise, *de Conditionibus Suspensivis, Devolutivis in diem, &c. De dominio in pendenti,* see Antonii Fabri Sebusiani *Consultatio de Montisferrati principatu, et* Jacobi Menochii *Responsa de causa Finariensi.* Sir George Lockhart, in his Information, cites one Cæsar Argelus as a late author writing on this purpose; (printed at Paris in 1669; he writes also *de legitimo contradictore.*) As to fiduciaries in tailyies, see Cujacius, *in Paratitlo ad titulum* 30, *libri* 5*ti Cod. de legitima tutela, ubi disserit de tutela fiduciaria. De cretione et institutione post diem;* see Cujace *ad Titulum* 9, *lib.* 6*ti, Codice, Qui admitti ad bonorum possessionem possunt; ibidem* to consider him on the titles, *de Successorio edicto, et de repudianda bonorum successione,* where if a person repudiate the inheritance *locus fit remotiori. Vide* Caroli Molinæi *Consilium primum,* where there is a contingent case; *et pagina* 11*ma in calce,* he says *caducitas intermedii gradus non excludit sed intromittit sequentem;* which makes for Melvill's second son. On the Chancellor's interlocutor there was a roundell made: *ens reale* (*id est* Melvill's second son,) craves to be preferred, *ad quantum et ad quale ens reale,* but I (*id est* the Chancellor,) say *nihil tale,* until I be interred; *ens reale* craves for to be served.

As to the original of tailyies in Scotland, with clauses irritant in case of contracting of debts, or not taking the name, &c., they are very late; the first of them are within these 60 or 70 years; what was first in Scotland was the *Laird of Calderwood's* tailyie of his lands, advised by Sir Thomas Hope; then there was one *Duncan's*; then there was *Thomas Moodie's,* as to the lands of *Sauchtonhall;* then *the Viscount of Stormont's,* as to the estate of *Annandale;* and many since, though the President in his system has declared himself no friend to such clauses.

In the tailyie of the *Dukedom of Hamilton,* it is provided that all the successors shall be of the Protestant religion, and if they forsake it, then by an irritant clause, the estate shall devolve and descend to the next in blood; it likewise bears that

none of them shall ever bear arms against the King or his authority, but shall ever assist him in all his wars, under amission of the feu. *Quæritur*, if thir clauses were inserted by themselves or the King. I hear of rare clauses inserted in *Mr Robert M'Gill, Lord Foord*, his charters of resignation, bearing a legend of his life. See some of his writings and collections *apud me*. See *8th November*, 1677, *No.* 650, § 2. *Advocates' MS. No.* 548, *folio* 275.

1677. *July 24th.*—The Chancellor's cause with my Lord Melvill, which he gained in winter last, on the *20th of February*, 1677; (see it, *No.* 548,) is now again revised and disputed; Melvill having borne it off all this summer session, (notwithstanding all the solicitation the Chancellor did make for a hearing,) till my Lord Lauderdale's arrival here: and he being come, Melvill turns the chase and obtains a hearing, which the Chancellor would gladly have shifted; and by my Lord Lauderdale's presence overawing the Chancellor's friends, he gains the cause: for the Lords this day found the King as superior of the estate and Lordship of Levin, had right during the vacancy to the retoured duty, (by which taxations were imposed of old.) Which retoured duty General Lesly had chosen to be a feather to denote his calling as a soldier, but Dundonald had lately converted and changed it into L.100 Scots yearly: and the truth is, retoured duties are always in money, though feu-duties may, and oftimes are, in other kinds of things. But as for the maills and duties, the Lords found they were not *bona caduca*, and nowise in non-entry, there being here no contempt nor fault against the superior, so much as presumptive or interpretative, which is requisite to all non-entries; but that they were *bona vacantia* and lying in *hæreditate jacente*, (though this was a new notion of it, never before heard of in our law,) and so fell under administration, and would belong to a *curator bonis datus (Vide Titulum istum de curatore bonis, in Digestis,)* from the King, who would be accountable and find caution; and reserved to both parties to debate upon their gifts, who had the right to the retoured duties.

See Andreas Gaill, *libro* 2 *Observationum, cap.* 130.

In ordinary non-entries, the retoured duties are only due before citation in the declarator; and if the vassal do not endeavour to enter, then the full maills and duties are due after that citation. Why the superior here in this vacancy is in a worse case, *non video*. Why he has not the full maills and duties *medio tempore*, but only the faculty of the nomination of an administrator to the behoof of the next heir that shall enter, which seems prejudicial to the King's casualties,—let our Gudelinus, who practises the *jus novissimum* so much, answer for it. Yet they alleged that the lands could not be in non-entry; because there was never a non-entry but where there is a *culpa et contemptus vassalli, intrare differentis; quod est quasi delictum, et ideo punitur jure feudali;* (yet in ward the minor is in non-entry *sine sua culpa*, for he cannot enter though he would;) and non-entries being odious, are not to be extended to cases where there is no *culpa*, for *ubi non est culpa, ibi nec debet esse pœna;* and Craig, *pagina* 279, tells that Mr William Oliphant did look upon non-entries as so odious, that he observed the Lords took all courses to abridge them, and he affirms that *succidenda sunt ejus putamina ex senatu*. Now, in the Chancellor's case there is neither *culpa* nor *contemptus*, because he has no second son to enter; *ergo*, there is no non-entry here. Yet *quod in favorem alicujus introductum est, non est in illius dispendium detorquendum; ergo*, since it is not the Chancellor's fault that he wants a second son, his wanting one should not deprive him of the maills and duties *medio tempore*, during the pendency and possi-

bility. In this case there could be no special declarator of non-entry; because there was none they could call or interpel as defenders *ad sustinendam personam rei*, (as in decreets *cognitionis causa* is done:) not the Chancellor's second son, because he was not *in rerum natura;* not David Melvill or his father, because they were not *veri contradictores*, their right being as yet suspended. One has writ a tract *De vero contradictore.*

On the 1st of August, at the Exchequer, the maills and duties of Levin were given by the King's letter of administration as *pater patriæ*, to David Melvill and his heirs, as *bona vacantia et nullius;* and makes him *curator bonis*, to defray the debt, for the use and behoof of the possible heir, and as his fidei-commissary. It did not bear given under any seal, and it was queried what seals it should pass. It being the first gift of that kind, the Exchequer may supply the defect, and ordain it to pass what seals they please. Presentations of archbishops and bishops pass all the seals. Presentations to other beneficed persons pass only the Privy seal. Patents to noblemen go, *per saltum*, to the Great Seal. See Hope's Minor Practicks, *Titulo, Of Signators.* They say, the Lords this session found, that the bedell of the chapel-royal's gift needed not pass any seals, that having been objected against it as a defect and informality.

On occasion of this tailyie of Levin, a hundred pretty cases may be raised. What if it had been failyieing heirs of a woman's body? When must that be understood to fail? If at 50 years, or later? If one be substituted, failyieing of children of such a man, and that man turns a monk and enters into a cloister, *an fit locus substituto, an vero amplius expectandum*, since he is *civiliter mortuus?* Yet he may recant and marry, and the arms of our church should ever be open to receive all who return. In the case of *Stormont's* tailyie and *my Lord Annandale's* creditors, discharging to contract debt under an irritancy of devolution to the next heir. What if a moderate sum be contracted for ransoming and paying a λυτρον for his father or brother from captivity? *Licebat jure Romano, pro redemptione captivorum, alienare etiam vasa sacra et ecclesiastica; ergo*, much more here. See anent ransoming relations, a case in the English time, 1657.

A clause of tailyie of lands to a man, his heirs-male and assignees, without more, (as was in *my Lord Ramsaye's* disposition of the *Scars* to *Abbotshall*,) may occasion a caducity if he want sons, and be surprised with death before he dispone; as was in the *last Earl of Dundie's* case, which made the King and Halton his heir; so that, failyieing of heirs-male, it is fit and necessary ever to provide the lands to the heirs whatsoever.

In a disposition by a father to his eldest son, with the burden of all his debts, both those contracted before the son's fee, (*quod inest de jure*, it making a passive title,) or after the fee; to secure it and make it effectual, it may be conceived with an obligement that they or any that shall succeed in that estate shall within five years (for a *laxamentum temporis* would, in equity, be given,) after the delation and devolution, enter heir, whereby they may be liable for all the debts; and in case they do not, then to bear an irritancy, that the estate and lands shall devolve and fall to the next in blood or next substitute, he entering heir (but he cannot enter heir, there being a nearer existent, though in the Roman law they might, *Tit. C. de Successorio Edicto, et de Repudianda bonorum possessione, ibique* Cujacius; yea, in Melvill's case, the Lords found his son could not enter heir so long as there was

a nearer possible;) within the same space, or rather, he giving his own personal bonds and engagements to the creditors for their debts. See sundry excellent clauses of tailyies in a Style-book beside me. *Vide* Cujacium, *in Paratitlo ad Tit. Cod. Qui admitti ad bonorum possessionem*, where he shews, *Quod testator additioni diem prestituere potest.*

Some superiors, when they give charters to their vassals, (particularly Argyle, &c.) they make themselves heirs of tailyie to their vassals in the third or fourth place, degree, and order of substitution; by which oft they fall to succeed in the property. But the vassals may alter it by a second bond of tailyie, or by granting a bond, whereon the lands may be apprised from them.

Supra, at No. 548, in Melvill and the Chancellor's case, I have remarked a very loyal clause was in the former Dukes of Hamilton their charters. Now I am informed, that in the charter of this Duke and of some other great persons, (which was also craved in passing Dom. Pedro Frazer, charter of Dores, on his father's disposition and resignation to him, but was refused by Dundonald; see the disposition and charter *apud me*;) there is a very different clause, viz. that in case any of them commit treason, they shall not forefault their lands, but shall descend and go to the next heir. This is *pessimi exempli*, and disadvantageous, and reflecting both on the honour, profit, and credit of the Crown.

See a large summary of Sir Alexander Frazer's disposition to his son, extracted by me in the beginning of November 1677.

Advocates' MS. No. 614, *folio* 294.

1677. *July* 25. ANENT PRESCRIPTION OF MERCHANT ACCOUNTS.

QUÆREBATUR,—If the act ordaining merchant counts to prescribe within three years, *quoad modum probandi*, militates against strangers, who are not tied by our law, and know not such as are *juris mere positivi*. Yet it was alleged, that it did prescribe even to them, where the subject matter contraverted was Scots goods, for then *actor sequitur et forum rei* and the laws of his country.

Advocates' MS. No. 618, *folio* 295.

1677. *July* 25. The COUNTESS of TRAQUAIRE *against* The EARL of SOUTHESK.

THE long debate between the Countess of Traquaire and the Earl of Southesk was decided this day. The Lords found the arbitriment to the Archbishop of Glasgow, Earl of Queinsberry, &c. not of an ordinary nature, in regard of these words, "They always having regard to the standing of the family;" and therefore sustained the decreet-arbitral. They found the irredeemable right was affected with a back-bond, and therefore appointed Southesk to count and reckon, &c.

Advocates' MS. No. 619, *folio* 296.

1677. *July.* The CHILDREN of Captain ROBERT LEIRMONT *against*

IT was found by the Lords, that some had forged the seal of the office of the College of Justice, in a case between the children of Captain Robert Leirmont and a stranger, about a commission for trying somewhat abroad.

Advocates' MS. No. 620, § 1, *folio* 296.

1677. *July.* EARL of DUMFREIS *against* HAY of Hayston.

THE Earl of Dumfreis gave in a bill to the Lords against Mr John Hay of Hayston, their clerk, complaining of him that he had interlined his name in a petition, making him consenting to an act very prejudicial, without any warrant from him. *Advocates' MS. No.* 620, § 2, *folio* 296.

1677. *July* 26. The CREDITORS of ELIZABETH HERIOT *against* SIR ANDREW RAMSAY.

IN the case of the Creditors of Elizabeth Heriot against Sir Andrew Ramsay, in whose hands they had arrested her annuity yearly of 300 merks; it went to the Lords' answer, whether this money, being of the nature of an aliment, was arrestable, yea or not. They found it was, in the general case; and arrestable, because it had succeeded in place of real rights upon the estate of Waughton, that she and her husband had disponed to Abotshall. 2*do*, There was a speciality in Isaack Brand, baxter, his debt, who was one of the arresters, because it was contracted for meat and drink; and so being alimentary too, was equally privileged, for *privilegiatus contra privilegiatum non gaudet suo privilegio.*

II. It was doubted how far an arrestment of an annuity will affect and reach, whether the whole year or only the term and current half-year, which is the opinion of some. See Sir G. Lockhart's information for my father against the Laird of Nidry, about arresting the rents of Carington by Nidrie.

Advocates' MS. No. 621, *folio* 296.

1677. *July* 26. SIR ANDREW RAMSAY of Waughton *against* WILLIAM AUCHINLECK, Maltman in Preston.

JOHN SMITH, chamberlain to the said Sir Andrew, having, in February 1676, sold 200 bolls of Sir Andrew's bear to this Affleck at L.11 or L.12 the boll; and ere the term of payment came, the markets and prices of victual falling consider-

ably, Affleck refused to stand to his bargain, except he were eased of 100 bolls; and as to the 100 bolls, he craved a long day. On this they differing, John Smith was necessitated to pursue him before the Commissaries of Edinburgh: where he proponed this peremptor, that the first bargain was innovated and resiled from by the second communing: which was taken off by this reply, that no respect could be had to the second communing, because it was never a complete agreement, nor perfected by writ as was appointed. This reply being admitted to probation, and witnesses led thereon, and advised by the Commissaries, they decerned for the haill 200 bolls.

On the 26th of February, 1677, Auchinleck presented a bill of suspension, and likewise gave in a bill to the haill Lords, complaining of the Commissaries' partiality and injustice; and desiring either the Lords themselves, or to delegate some of their number, to call for the testimonies of the witnesses, and compare whether the reply was thereby proven, yea or no.

The Lords, by their deliverance of the 27th of February, having considered the bill, and desire thereof, ordained the Commissary Clerk to deliver the haill process to Mr Thomas Hay, clerk to this present process, and appointed letters of horning to be directed for that effect; and till the conclusion of the depending cause, and discussing of the reasons of suspension, discharged any execution to be used at the instance of the charger against the petitioner.

In June, it being, upon a bill given in by the charger, recommended to Newton, and being called by him, it was alleged that the reply was not proven in the precise terms, and *in tota latitudine,* as it is proponed. ANSWERED,—There was as much proven as was necessary *ad victoriam causæ;* and if the inferior procurator had ignorantly and superfluously burdened himself with proving that which was not relevant, it ought not to prejudge the charger. Yet see *supra,* where the Lords declared they would not admit that allegeance of a probation sufficient *ad victoriam causæ;* because parties sometimes, on the confidence that an entire allegeance, as it is proponed, can never be all proven, will of consent find it relevant, and will not be scrimp or critical in examining its justice or relevancy. See Stair's Decisions, *January* 25, 1662.

The debate being reported by Newton on the 22d of June 1677, and the Lords having considered his report, with the defences and reply admitted to probation before the Commissaries, and the depositions of the witnesses adduced for proving thereof, they find it sufficiently proven that it was the meaning of the parties to restrict the first bargain to 100 bolls; and sustain the first bargain only as to 100 bolls, the one-half of the victual of Waughton, and the other half of the victual of Auldcambus; and, therefore, find the letters orderly proceeded for the price of 50 bolls of the said 100 bolls, at L.12 : 6 : 8d. per boll, and for the price of the other 50 bolls thereof, at L.11 : 10s. per boll; the charger always delivering to the suspender the said number of 100 bolls of bear, good and sufficient stuff, 50 bolls thereof of the growth of Waughton, and the other 50 bolls of the growth of Auldcambus, and that of the crop and year of God 1675; and suspend the letters for the remanent sums charged for.

At the extracting of this decreet for the 100 bolls, Affleck presented a second bill of suspension, on this ground, that he could not be obliged to take that bear of the crop 1675 which had been offered to him, and was lying in Cockeny, girnelled; because it was spilt [spoiled] and insufficient stuff. We offered to prove it was callor, wholesome, and sufficient, as any victual could be that had lain so long.

The Lord Glendoick, before whom this second bill fell as ordinary, issued out an

act and commission to Patrick Brown of Colstoun, Sheriff-depute of East Lothian, to pass to the places where the bear lies, and there, with the advice of skilled maltmen whom he shall call to him, visit and take inspection of it, if it be rotten or spilt, and report betwixt and the 17th of July. Accordingly, he having visited, returned his report that it was good and sufficient as any bear of the year 1675 could be. *Vide supra, James Hamilton* and *Earl of Roxburgh*, No. 598, [*July* 10. 1677.] When the Lords came to advise the report, all they had to say against it was, that the Sheriff had not visited within the days limited to him by the commission: which the Lords repelled in respect of two answers. 1*mo*, That the Sheriff-depute could not possibly attend these days; because, his master and constituent, the Duke of Lauderdale, being then entering Scotland, he was waiting on him. 2*do*, The defender had no prejudice, for he compeared at the visitation, though he protested against the Sheriff's procedure, in regard the days prefixed were expired, and it bore not with continuation of days. The Lords found the report proved not the reason of suspension, and therefore, *pro secundo*, found the letters orderly proceeded.

Their last refuge was to offer to prove, by John Smith's oath, 1*mo*, That the victual offered was spilt with the sea water. 2*do*, That it was not of the growth of Waughton. 3*tio*, That it was not of the crop 1675. All which John Smith having denied; at last we got our decreet extracted.

It was thought a point of favour to sustain the commission executed after the day, for Gosfuird had one casten on that single head.

On the 27th of July, at Exchequer, Auchinleck obtains the gift of his own escheat, upon the horning of one Cathcart against him for L.12 Scots; though the act of the Parliament 1592 seems to declare such gifts taken by the rebel null; yet here, creditors were not prejudged, for it accresced to them; and this was the first reason that moved the Lords of Exchequer to pass it. The second was, that the execution of the denunciation was false, as the messenger doer thereof had on his deathbed declared upon oath. But, though this might hang the messenger or make him infamous, yet it should not annul the lieges their diligences, who were not *participes fraudis*. See the case of *Ramsay*, notary, cited in the criminal pleadings for *Muire of Auchindrane*, in 1611, who was panelled for killing the *Laird of Cullayne, Tutor of Cassills*. *Vide L. 3tiam, in principio, D. ad Senatus-consultum Silanianum.*

On the 1st of August, 1677, Sir Andrew Ramsay obtains the gift of the said Affleck's single escheat, upon his own horning against him. *Vide infra, No.* 655, [*January* 10, *Seton* against *Seton.*] *Advocates' MS. No.* 623, *folio* 296.

1677. *July* 26. The MASTER OF RAE *against* The STRANAVER-MEN.

THE Master of Rae obtains a decreet against the Stranaver-men for 40,000 merks, as the avail of the hareships and depredations made by them during that inroad into Caitnes in 1668. The depositions of the witnesses amounting to upwards of thirty sheets of paper, the Lords referred to two of their number to peruse; for it had been impossible at any one sederunt to have gone through them all, much less have considered what was proven by two concurring witnesses, and

what not. These two, viz. Forret and Newton, to whom it was recommended, drew them all under general heads, and marked what each of them materially deponed, and how many agreed in one thing.

Advocates' MS. No. 624, § 1, *folio* 297.

1677. *July* 27. The DUKE OF YORK *against* The EARL OF ARGILE.

THE Duke of York, as High-Admiral of Scotland, raised a declarator against the Earl of Argile, that the Spanish ship cast away upon the isles of Scotland *in anno* 1588, being one of the prime ships of that Armada, belonged to him as Admiral, by which office he has undoubted right to all wrecks. See a little of this action in another little MS. beside me.

It was ANSWERED for Argile, that he had the sole right to that ship, because his father had a gift of it from the Duke of Lennox, who was high-admiral for the time, and it was confirmed in Parliament, and clad with possession by taking guns and other things furth thereof.

REPLIED, The gift was null, not being subscribed by his Majesty, though by the narrative it appeared it was so intended, for his Majesty was inserted as a disponer. *2do*, The *quota* to be given to the Duke of Lennox was left blank, which proves it was but an imperfect evident; whereas lately, to ocular inspection, there is filled up the fiftieth part, which is so unsuitable and disproportionate to his interest, that it clearly appears that could never be communed. *3tio*, The Duke of Lennox could not dispose upon that which was not *in illius dominio;* but such was this ship, for the law has condescended on certain ways how property shall be acquired, and has determined that it is not *nudis pactis*, but *traditionibus*. And possession is an essential requisite and ingredient to the constitution of property with us. Now Lennox had no possession of it. And as to those faint deeds of possession that Argile condescends upon; whatever they might import in things lying upon the earth, they can never pass for a sufficient possession of things lying in the bottom of the sea, *in fundo maris;* for they require another kind of possession ere one can have right thereto, and that is locomotion, they must be stirred out of the place that possesses them. This ship is in a manner *sub maris dominio et potestate*, the sea is the *medius obex*, the *medium impedimentum* that hinders acquisition of property in it; this *obex* is not removed nor overcome but by *locomotion*, which Argile cannot pretend to. Then Sir George Lockhart urged, with a great deal of elegancy and subtilty, the parallels of a *fera bestia* wounded, of a treasure found, or of mines in the bowels of the earth, and of the *aper* taken *in rete et cassibus* mentioned by *Ulpian Pomponius Proculus, in L.* 44 *and* 45 *D. de acquirendo rerum dominio.* Vide supra, *June* 1677, No. 578, anent mines, from act 12 in 1424, and act 27 in 1649. Supra *January* 24, 1677, *the Tortoise*, No. 535. See our 124th act, of Shipwrecks, in 1429. He farther alleged the giving the admiral right to wrecks *in fundo maris*, before he apprehended any possession, was to state the right of property of these wrecks in the person of each admiral, so that he might dispose upon them as freely and absolutely as he might have done upon any other thing that was his uncontroverted property; and at this rate, that ship of the 1588 would, by thir principles, have belonged to the Earl of Bothwell who was

then Admiral of Scotland, and would have transmitted and devolved to his heirs and successors if it was his property, which is absurd. He might have gifted it and in general all the wreck that had happened on the coast of Scotland since the flood of Noah: which is equally absurd as to imagine that an administrator of an office can gift its casualties, in great, or thereby forestal, prevent, and anticipate the benefit of his successors. *Vide supra, No.* 588, [*Archbishop of Glasgow* against *Commissary Clerks of Peebles, June* 29, 1677.] For an admiral can dispose upon no more of naufrage goods than he knew, and no more of what he knew than he had by a fixed and solid possession (though not total) put himself in a rational hope of compassing. All the rest stands as it were in its native freedom, continues to be *nullius*, and remains to be the fruit of some succeeding industry.

DUPLIED,—That the King being heir to Lennox, is bound to warrant his gift in favours of the Earl's father, since the Admiralty accresced to the King, and was by him conferred on his brother. That there is no warrant in law for that distinction, why more solemn possession is requisite of things detained *in fundo maris*, than of any other; that law attends no more but a symbolical possession, a possession of a part to give right to the whole. So Craig, in the symbolic possession by seasine and tradition of earth and stone, pag. 133 and 175, and the marginal notes there. So Dury, 17 *December*, 1628, *Chalmer* and *Craigievar:* and they argued from the fens in England and sands at Montrose; *de quo vide supra, hoc mense.* See the Rhodian laws, *apud me*, published by Gothofred. *Vide Tit. C. de Naufragiis, libro* 11, *Tit.* 4*to; item, Authenticam de Naufragiis, C. de furtis; Grotius, de jure belli et pacis, libro* 3, *cap.* 6, *N.* 3 *et* 4, *pag.* 474. *Non omnis possessio* (*inquit Grotius,*) *sufficit; sed requiritur firma permanens.* And locomotion was called an idle fancy; for it was supposed the ship were brought to the surface of the water, and fell down again, were not that a pregnant deed of possession?

Argile himself had a little discourse, showing the vast expense he had been at in making the discovery: and wished once it were brought above board, and were on the dry land, ere we discorded about the division of it; else it should in earnest verify the proverb of the King of Spain's gold; that if any of these gentlemen doubted of the truth of his discovery, he should take them down and let them see it, if they were content.

The Earl of Kincarden, as Judge-Admiral, had also a short address to the Lords.

But they found, *una voce, nemine contradicente,* (that the Duke of York might not imagine he had got wrong, which might have been imagined if any had voted for him,) that the Earl of Argile had best right; and therefore they preferred his gift, and sustained his defence thereon, and assoilyied from the Duke of York's libel.

The Duke would think himself but soberly obliged to them who advised him to this groundless process, which was thought to be by the information of S. G. L. But his Highness wrote down a very complimenting letter to Argile, approving the justice of the Lords' sentence, and showing his hearty compliance and acquiescence therewith.

There was also another claim to this ship in the person of Tillibardin, now of the Marquis of Atholl, who laid it at the Duke of York's feet; it was a gift from King James to it, in favours of Tullibairden. But it was of no moment; for, 1*mo*, It was prescribed, nothing having followed upon it by the space of 40 years, neither was it ever clad with the least possession. 2*do*, It was only granted by the King, and so

flowed *a non habente potestatem*, the King being denuded in favours of the Admiral, by the patent. *Advocates' MS. No.* 625, *folio* 297.

1677. *July* 28. GRIERSON *against* COLQUHON.

GRIERSON and Colquhon, anent the returning of the prentice fee, or a part of it, conform to the time the prenticeship stood, or that was to run when the prentice died. See of this a little note, *supra, No.* 133. It seems not so precisely reasonable that it should divide equally *pro rata temporis:* but more should be allowed to the master the first year, than for the second or subsequent ones; because he is at the same expence upon his prentice the first year, that he is afterwards, and at much more trouble and pains in teaching him his calling, and gets far less service from him, whereof the boy is not yet capable; and so the master's benefit and acknowledgment, upon that account, should be more in the beginning of the apprenticeship than afterwards. But Mr Colquhon's bond he gave, providing how it should return and when, would regulate that case. *Vide Paullum in L.* 4, § 5, *D. de Statuliberis: Joannem Vandum, libro* 1 *Variarum Quæstionum.*

Advocates' MS. No. 628, *folio* 298.

1677. *July.*

A WOMAN is provided to the half of the fee of some lands, failyieing of children of the marriage, the other half going to the heirs of the husband: the husband dies and leaves a son: the woman raises a pursuit of declarator that she ought to have right to the half of the fee, because the child was not her husband's but got upon her by another man, and not procreated of that marriage by him. Sir John Gilmour, being president, took the summons and tore it, and imprisoned the woman. See Craig, page 270, *de quadam regina* that in spleen against her son called him a bastard. In the Countess Dowager of Erroll's pursuit against the Earl, it was alleged against her, that she could not crave the additional jointure of 10 chalders of victual, provided to her in case there were no children procreated of the marriage betwixt them, because it was her own wyte that did not cohabit: *sibi imputet* that she had no children.

The Lords laughed heartily at the defence: and it is true indeed in one sense that *per eum non stetit* there was no bairns.

Advocates' MS. No. 632, § 1, *folio* 299.

1677. *July.* ANENT CLAUSES OF CONQUEST, IN CONTRACTS OF MARRIAGE.

CLAUSES of conquest, in contracts matrimonial, provided to heirs of the marriage,

are very far different as to legal effects, from clauses providing the conquest to the bairns procreated; for bairns *qua* bairns, they are not bound to warrant their father's deed. Thir clauses of conquest impede the father's disposal of the conquest to other bairns of another bed, but do not hinder his free disposal of it to strangers, unless he were inhibited. See this *supra*, *Catharine Mitchell's* process against the *Littlejohns*, in *June*, 1676, *No.* 478.

Thus Sir G. Lockhart resolved in *Seton of Barnes* his Irish affair.

Advocates' MS. No. 632, § 2, *folio* 299.

1677. *July.* ANENT CONSUETUDE.

PEOPLE run a great risk by consuetudes, at the beginning, because of the power and arbitrariness left to judges; but after it is brought to a ripeness and a consistency, it may be very profitable. See Stair's system, *Titulo* 1, *Of Common Principles, parag.* 9, *in fine.*—Oldendorii *Classes in argumento operis, Titulo de Ordine juris,* § 10. Cujace *ad Titulum C. Quæ sit longa consuetudo.* And it is hard in a monarchy to give people the power of introducing or abrogating laws; for they may kick the wholesomest laws out of doors; and it is undetermined how many acts, and how much time must go to the making of a fixed and settled consuetude; and it is not easy to discriminate if it be *bona* or *mala consuetudo*, or *vetustas erroris*, or *originem a viris probis trahens.*

Advocates' MS. No. 632, § 3, *folio* 299.

IN November, 1676, one having charged on a liquid bond, it was suspended on this reason, that the charger above his annualrent had received stones of cheese, which behoved either to be usury, which is not to be presumed, being a crime, or must be ascribed to defalk of the principal. 2*do*, Cheese is not liquid, nor commutable with money, and so not compensable, since all compensations must be, by 141 act of Parliament 1592, *de liquido in liquidum.* ANSWERED, The cheese was gifted, and nothing spoke of at the time to signify in the least that it was in part of payment. REPLIED, He must prove it was a donation; for debtor *non presumitur donare.* The Lords allowed the cheese, its price being presently liquidated and constituted to compense the clear liquid bond.

Advocates' MS. No. 632, § 4, *folio* 299.

1677. *July.*

ONE is pursued for a spuilyie; he defends that he found the horse eating his grass, and he poinded it till the scaith were prized. The Lords found his allegeance and defence only relevant in thir terms;—that he put it in a poind-fauld beside grass

and water, and caused one having jurisdiction as the bailie or heritor of the bounds, apprise the scaith, and then offer it back to the owner on payment thereof. *Vide, L.* 39, § 1. *D. and L. 5tam C. ad legem Aquiliam;* see act 11, Parliament 1535, and Bartolus there cited.

Thir two decisions I read in the President's *Collection of Practicks.*

Advocates' MS. No. 632, § 5, *folio* 299.

1677. *July.* ANENT PRESCRIPTION.

IT was affirmed to me that the King's taxation, and Lords of Session's taxation in 1633, do not prescribe within the 40 years: at least that the ten years of the English usurpation must not be reckoned in that count; because they were then *non valentes agere, contra quos nulla currit præscriptio. Vide No.* 631, *Lindsay* and *Fraser,* [30*th July,* 1677.] There was two years, viz. from *February* 1659, till the end of 1660, that must be discounted in all prescriptions; because there was then no courts in Scotland: which is much to be attended in counting prescription, where it is but shortly past. *Advocates' MS. No.* 632, § 6, *folio* 299.

1677. *August* 1. ANENT ADJUDICATIONS.

THE President caused the Lords call back for a decreet of adjudication of some of my Lord Cathcart's lands; and stopped the signature of infeftment, sought to be expede thereon at Exchequer, though it was extracted ten days before; only because it was not inrolled, but called and decerned amongst the acts; whereas the new adjudications use all to be so called, unless where there is compearance for the debtor; in which case, conform to the act in 1672, he will get a day to prove the value of the lands, and to produce the writs; and if this were an informality, then 20 decreets of adjudication will fall. Yea, in this case the master of Cathcart had written a letter to the party, acknowledging the debt, and offering to take a course therewith. But he is the President's son-in-law. See of concussion, *supra, in July* 1677, *No.* 592, *Mistress Jean Gray* contra *Sir A. Primerose.* Anent the summary calling of adjudications, see *No.* 453, *supra, Nasmith and Kello,* § 3, [*February* 1676.] *Advocates' MS. No.* 634, *folio* 299.

1677. *August* 3.

SIR ANDREW RAMSAY'S signature of the lands of Waughton, Abotshall, &c. upon his father's resignation was passed in Exchequer. But in regard there were sundry feu-duties owing for Linton, East-Forton, Auldcambus, Fast-Castle, &c.

and no discharge or *æque* made in Exchequer for them; nor no *novo-damus* shewn, (and yet I hear they regard not a *novo-damus*, and though it be passed and subscribed at Court by his Majesty, they exact the preceding feu-duties;) they would not give out his signature till these were satisfied; and they might crave 39 years back.

Advocates' MS. No. 635, § 1, *folio* 299.

1677. *August* 3. EWART, Provost of Dumfreis, *against* M'GUFFOCK of Alticray.

M'GUFFOCK of Alticray, presenting a signature, upon an adjudication of some lands belonging formerly to the Lord Kircudbright; compearance was made for Mr William Ewart, Provost of Dumfreis, who stood infeft in some of them; and it was ALLEGED, no infeftment could pass as to these, but they behoved to be expunged, because this signature was to the behoof of Sir David Dumbar of Baldune, and he had renounced the adjudication in so far as concerned these lands. Whereon Baldon being examined, denied the same.

Advocates' MS. No. 635, § 2, *folio* 299.

SUPRA, at number 500, and 501, in October 1676, I have made a small collection of law observations, I had dispersed up and down in other paper-books, and pointed at the places where they lie, that it may serve for a ready direction; like the names affixed to the apothecaries' pigs and boxes. In prosecution of that method, I shall here shew where my extraneous law remarks, not contained in thir sheets, and may be called *extravagantes communes*, since that time, are, it being the space of a year. They are contained in a manuscript book, which begins with

The qualifications requisite in electing Commissioners to the Parliament. *2do*, If bills of exchange bear annual rent after accepted. *3tio*, Anent the link between disturbances in Church and State. *4to*, From Bouritius *de officio judicis*. *5to*, Some satire lines. *6to*, Anent arresting boats. *7mo*, Anent charters of lands in the Canongate. *8vo*, Anent Sinclair's Practiques, and Nicolsone's, and Durie's, and Colvill's. *9no*, A summary compend of my other law observations. *10mo*, From Skeen in *Regiam Majestatem et Leges Burgorum*. *11mo*, Anent suffocation of monstrous births. *12mo*, Anent burnt tenements. *13tio*, Anent the action flowing from an infeftment of annual rent. *14to*, Anent the encroachments of Secret-Council and Exchequer, on the Session and criminal Court. *15to*, Anent women being witnesses. *16to*, Anent macers' qualifications, and the hours of the Lords' sitting. *17mo*, Anent a clause in a feu of some lands in Douglas. *18vo*, Anent the town of Edinburgh; anent festival days; the Lords' varying decisions; sundry ridiculous things in our acts of Parliament; a compend of Aberdeen's

charter in 1638; anent arbitrations; anent the clerk of the bills his being liable for the cautioners he receives; anent the King's advocate's pursuing improbations alone; anent inverting pious donations; anent the true crisis of a process; and an infinite number of other observations that are to be seen in that book; to which I refer, it being sufficient to have hinted at a few of them.

Advocates' MS. No. 643, *folio* 301.

1677. *November* 1. ACTS OF SEDERUNT.

THE Lords fell upon some acts of Sederunt,—1*mo*, Discharging all solicitations to be made to the Lords of Session by the parties, their advocates, &c.; see two old acts against it, one in July 1596, another in July 1657.* 2*do*, That where the charger or pursuer is not ready to insist for that week, he shall be heard upon his application to the Ordinary; but if he do not crave a hearing during the time that the Ordinary who called it is in the Outer-House, then it must be enrolled of new in the end, and posterior to all the causes in the book of enrolment; else defenders shall be defrauded of all the benefit and certainty designed them by the regulations, and be put week after week to attend the pursuer's malicious delay and uncertain motions. *Vide supra, January* 1677, No. 529, the same thing done. The third was prohibiting the clock to be kept back at 12 hours, at any's desire whatsoever.

Advocates' MS. No. 644, *folio* 302.

1677. *November* 3. ANENT MINORS INCURRING PASSIVE TITLES.

A MINOR is convened upon the passive titles, to pay a debt owing by his father, and in the relevancy and probation it is condescended on, that his tutor intromitted with the maills and duties of the minor's father's lands, and applied them to the minor's behoof; which must infer *gestionem pro hærede* upon the minor.

ALLEGED,—*Non relevat;* for tutors and other administrators *meliorem possunt facere pupilli conditionem sed non deteriorem*, and it were hard that their deeds should bind an odious passive title upon an apparent heir, not being his own deed, though it be converted to his utility; since *id intelligere non presumitur*, unless he were infeft in those lands; and the most he can be made liable in, is allenarly *in quantum minor locupletior factus est*, or to restore what he so intromitted with.

ANSWERED,—That a pupil or minor acting with his tutor or curator's advice, that so redintegrates his person, and supplies the defect and imbecility the law presumes in him, that *minorem representat majorem;* else creditors might be disappointed of their payment where the apparent heir was minor. Neither would this anyway evacuate the privilege of minority; for though the tutor's intromission was

* *Carfania impudentissima mulier causam prætoris edicto de postulando dedit, L.* 1. *paragrapho* 4. *de Postulando.* Some named Tolquhon, and his brother Thomas Forbes, as they who gave principal occasion to the making this act against solicitations.

actus in jure validus to import a passive title, yet if the minor found himself lesed, he might revoke and be restored against it *in integrum.*

Craigie went a greater length than was needful, for he thought even a protutor's intromission would bind a passive title on the pupil; but this is scarce consonant to the analogy of law. *Advocates' MS. No.* 646, *folio* 302.

1677. *November.* ANENT REFERENCE TO A WIFE'S OATH.

IT was questioned, where a woman in her viduity lends out a sum of money, and takes a bond for it, and afterwards marries, and her husband charges the debtor to make payment, and he suspends, and offers to prove by the wife's oath that either it is paid, or that she discharged him of it, or promised never to seek it; and the husband answers, that he will not suffer his wife to depone to his prejudice; whether this be a good answer, yea or no. If he produce the wife's discharge in writ anterior to her marriage, there is no doubt but it will cut off the husband from seeking that debt. But it remains more controverted where he has no other way of probation of the payment or promise, but by the wife's oath; for if her oath were receivable, a widow of an opulent fortune might easily, by her oath, defraud and disappoint her husband, for she might lift up all she could get, and give them down the one half, to get it up from her husband: which is not to be allowed; yet see it sustained in Dury, *March* 16, 1622, *Home* and *Macmath.* Yet some make a distinction, that a husband needs not suffer his wife to depone in a cause where the result of is *ad debitum contrahendum,* to infer or draw on an obligation or a debt upon the husband, for there he is *in damno vitando;* but she may be forced to depone *ad debitum distrahendum,* for liberating a third party from a debt, because there the husband's prejudice is not so great, and he is *in lucro captando;* yet even there she has a prejudice. Yet if collusion could be made out, that she did it maliciously, and, only to prejudge her husband, lifted sums, I think it would have its own weight, and deserve consideration, since *dolus proprius nemini debet prodesse.* What if the sum lent by the wife, in her viduity, be due by an heritable surety? then the husband, *jure mariti,* has right to no more but the bygone annualrents of it, and in time coming, unless it was made moveable by a charge of horning; yet, as administrator to his wife, he may uplift the principal, and he and she discharge it; and if she once consent to that, then it becomes moveable, and falls under his *jus maritale.*

1677. *November.* ANENT BONDS BY MARRIED WOMEN.

WHAT if a woman grant a bond with her husband, and swear never to come in the contrary, nor to quarrel or impugn it, if she be charged for the sum, and allege *absolvitor, ex senatus-consulto Velleiano,* as being married at the time, whether the oath integrates the obligation, so as to make her liable? Either she is bound as principal, or as accessary with her husband, *et eadem facilitate jurat qua contrahit.* See the *Authent. C. Si adversus venditionem,* beginning *Sacramenta Puberum.* See Dury, *March* 16, 1622, *Sir George Home* against *Macmath. Vide supra, June* 26, 1677, *Charles Oliphant* and *Provost Curry.*

The Lords, on the *8th of November* 1677, found the bond, *ipso jure,* null, *quoad*

the woman, because then *vestita viro*, though the bond was *juramento vallatum*. *Vide infra, No.* 4, in *Barbara Grant* and *Cuthbert's case.*

Advocates' MS. No. 647, *folio* 302, *margin.*

1677. *November.* ANENT TRUSTS AND BACK-BONDS.

THIS case was started among the Advocates,—A man assigns a bond owing to him by a certain person in favours of another, to the effect that other person may thereupon do diligence, lead a comprising, and then denude; and that other person who is the trustee, feoffee, or fidei-commissary, to whom it is conveyed, grants a back-bond, declaring the trust, and obliging to denude. The trustee, either voluntarily, or upon legal diligence, transfers this bond, and apprising following thereupon, in favours of another party, not him by whom he was entrusted; or the right of it is adjudged or apprised from him by some of his creditors legally, who found the right of it standing in his person, and they become infeft upon their diligence, and dispone and assign it to another, and he to a fourth; and so it passes amongst many hands, and to sundry singular successors. Now, the question is, The first person that intrusted him, and to whom the back-bond clearing the trust was granted, or his heirs and assignees, getting notice of this conveyance clearly to his defraud and prejudice, made by one in whom he put confidence, if he may not raise a declarator of the trust, founded on the back-bond, against these singular successors: (for that he will prevail against the granter of the back-bond and his heirs, there can be no imaginary doubt:) and if the trust be so connexed to the thing trusted that it is inseparable from it, and follows it, *licet transierit per mille manus*, as *accidens reale*, or if it be only a personal obligement that affects not *rem ipsam realiter*. *Vide infra*, [No. 722, *February* 6, 1678,] *Hector Mackeinzie's case.* Either the back-bond is of the same date, and before the same witnesses, and relative to the disposition of the thing trusted, or it is of a different date. If it be of the same date, it is *pars contractus et pactum incontinenti adjectum*, and may seem to affect the thing disponed; but if it be of another date, then it cannot be pretended to. *2do*, Either he in whose person the disposition and right was trusted, transferred it to another for onerous causes, or without it. If the third party, who is the singular successor, has acquired it gratuitously, he may the less grudge and complain to have the trust to meet him, and affect and follow the thing disponed. But if he be an assignee for a cause onerous, and not *particeps fraudis*, knowing nothing of the back-bond, it is not so easy to comprehend how the back-bond or trust can be obtruded or declared against him, so as to clog his right; for what was there in law to put him *in mala fide* to bargain and contract with that person whom he found to have the sole and undoubted right of the lands or bond standing in his person? How could he, without divination, know it was only a trust, and that there was a back-bond; there having been no intimation of it made to him, no inhibition served upon it to put the lieges *in mala fide*, or to ascertain them there was such a thing? And if such latent deeds were regarded, there could be no commerce nor freedom in bargaining anent rights. Yea, though the back-bond were registrate, yet that cannot be esteemed a sufficient intimation, since that registration is not *necessitatis*, but only *actus meræ voluntatis;* and the lieges are not bound to search for it, be-

cause there is no law enjoining the registration of such back-bonds as necessary, and so no law obliges one to take notice of him. Where a man gets an assignation to a bond, and puts his assignation in the register, that will not be such an intimation as will hinder another party from taking a second assignation to that same bond, and from being preferred if he intimate first, notwithstanding the registration; for registration is not, by our law, a sufficient way of intimation, unless where a special statute has declared and determined it shall be so, as in the case of registration of seasines by the act of Parliament 1617. *Vide supra*, *25th February*, 1671, *numeris* 154 and 155; *item*, *1st December*, 1671, *Crightons* contra *Caruthers*, No. 275. Next, it may be considered, how the tenor of the back-bond is conceived; if it be only *in nudis terminis* of an obligement to denude *per verba de futuro*, or if it bear words actually dispositive *per verba de presenti*; for if it bear, "and by thir presents dispones," then it may be alleged that such a back-bond affects the real right, and follows it.

It may be objected, why may not a back-bond, though latent, as well affect the right of the disposition given in trust, as a discharge or intromission equivalent to the value will annul an apprising, against the singular successor assigned to that apprising? For how shall the assignee know when he sees a valid and legal apprising disponed to him, that his cedent has either by a clandestine writ under his hand, discharged and renounced that apprising, or has uplifted as many of the maills and duties as will pay his apprising, and sums therein contained? Yet these two, either a discharge or intromission, will evacuate the comprising even in the person of the assignee.

To this instance it may be answered, that the cases are not alike; for an apprising is only a subaltern and parallel security, that can consist with the debtor's own real right in the lands, and is only accessorian to the principal obligation of the debt; which being satisfied and removed, the other falls in consequence, especially where there is no more but a decreet of apprising; for if infeftment hath followed thereupon, then a discharge is not the *habilis modus* to take it away, but there must be a renunciation of it, and that must be registrate within 60 days, conform to the act of Parliament 1617.

And it is a special singularity in our law that has allowed that way of extinction of apprisings with us, which is not to be stretched nor extended beyond its limits to other real rights, or to the case of a disposition and a back-bond. See Stair's System, *Titulo, Apprisings*, in the case of *Waterton, Pitfoddells*, and other creditors of *John Donaldsone*; see the scroll of that decreet of *Donaldsone's creditors* beside me in 1664. *Vide supra*, anent the co-respectivity of counter obligements, *December*, 1672, *The Lyon* and *Arthur Forbes* about the *Lord Salton's* escheat, No. 377. *Advocates' MS. No.* 647, § 2, *folio* 302.

1677. *November.* ANENT CONFUSION.

THERE is a superior, or a lord of a regality, who is debtor to his vassal. This vassal goes to the horn. The superior, or lord of the regality, gifts the escheat for a sum of money. The donatar, in his special declarator, pursues the superior, or lord

foresaid, as one of the debtors. He excepts, that *confusione tollebatur obligatio, eo ipso momento quo jus eschætæ erat ei devolutum et quæsitum.*

ANSWERED,—The debt became not extinct by confusion, unless the superior had declared the gift in his own name, for no sooner was the dominion of the escheat goods established in his person: before that, he has only *jus ad rem*, like an executor's right in the executry goods before a sentence. *Vide supra*, a pretty decision in *Mr Arthur Gordon's* case against *Irving of Drum*, on the *8th December*, 1671, No. 288. And in gifting it, he should have specially reserved and excepted his own debt; likeas if it had been extinct, yet it reconvalesced by the general assignation. Yet *quod semel mortuum est nequit iterum revivisci.* See anent the *Town of Edinburgh's* imposition upon the ale, and their getting up their contract anent it from the Lords of Session, in March, 1676; in another paper-book.

Advocates' MS. No. 647, § 3, *folio* 303.

1677. *November* 8. BARBARA GRANT *against* JANET CUTHBERT.

WHERE a bond is granted payable to a man and his wife, and the longest liver of them two; yet the Lords have several times found, and particularly in the case of *Gregorie Grant* and *Bailie Fraser*, that the husband, as *dominus bonorum*, is in the power and freedom to uplift and discharge without his wife, and that she has no right nor interest to quarrel the same. And yet, on the 8th of November, 1677, the Lords decided the contrary, in the case of Barbara Grant, relict of William Neilsone, merchant in Invernesse, against Janet Cuthbert, relict of Archibald Neilsone, son to the said William. The case was this:—William Neilsone grants a bond for 400 merks to his son Archibald, and Janet Cuthbert, his future promised spouse, (before their marriage,) in liferent and conjunct fee, and to the heirs of the marriage in fee; William, in his testament, recommends to his wife, Barbara Grant, whom he names his executrix, to pay this sum. Accordingly, she actually pays it to her son Archibald, and recovers his discharge of it, but not the bond: therefore, after Archibald's death, she convenes Janet Cuthbert, his relict and executrix likewise confirmed to him, to exhibit and give her up that bond as satisfied and paid. The Commissary of Inverness, before whom it is pursued, decerns her to give it up. She suspends upon this reason, that the Commissary had committed iniquity in decerning her to give up that bond, upon the pretence that her husband had received payment thereof; because it being a bond granted by the father to his son, and to the suspender, his daughter-in-law, before her marriage, and being made payable to him and her in liferent and conjunct fee, and so she being provided to the liferent of it; the same could not be uplifted, discharged, nor disposed upon by the husband alone, neither ought she to be prejudged by their collusion; and the charger was *in mala fide* to pay it to the husband, without she had seen it re-employed.

Whereunto it was ANSWERED for the charger, that the reason ought to be repelled as altogether irrelevant; because the husband's taking of the bond payable to himself and wife in liferent and conjunct fee, could never so state her in the right of that sum, as to impede the husband from uplifting the money at his pleasure and discharging it; in so far as the dominion of the sum remaining still *penes maritum* and the last termination being upon his heirs, and the wife being under the

power of the husband, this were to invert that order, and to put the husband *quoad* this sum under her power, and to state the propriety of the sum in her, and to hinder all commerce and freedom of bargaining between man and man. *Et quid juris*, if the husband had assigned the bond, or it had been affected by his creditors' arrestments or other diligences? The debtor would not have been heard to refuse to pay the assignee or arrester; and the adjection of the wife is but a personal quality, and not *accidens reale;* and the relict, suspender, has action against her husband's representatives, to get the said provision made up to her. And it not being due upon an heritable security, but a simple moveable bond, *quid impedit* why the husband could not validly discharge it, it being truly paid to him without any collusion? And as double payment is odious in law, so *solutio cum bona fide facta* is very excusable, and is privileged sometimes to operate liberation; especially where it is made by a simple and ignorant woman, in whom *ignorantia juris excusatur; præsertim ubi agitur de damno vitando*, as here, *L.* 6, 7, and 8 *D. de juris et facti ignorantia.* Besides, by the conception of the bond, *non apparet actum* that this was to be a part of her liferent provision, but is only a clause of style adjected of course, *hoc maxime attento*, that by a posterior contract of marriage she is competently provided *aliunde.*

This debate being taken to interlocutor, and reported by my Lord Orchardton, (Pitmedden ox,) as a part of his trial, the Lords found the wife had such a right to the liferent of this sum, that the debtor could not securely pay it, nor the husband alone lift it; at least, he had no otherways power to lift it, without it had been re-employed in the terms of the former bond, to be forthcoming for her liferent use, since it was granted to him and her before their marriage, and so could not be changed nor altered without her consent; for bonds taken by a man to himself and his wife in liferent and conjunct-fee during the marriage, they are presumed to be the husband's means, and so fall under the compass of *donatio inter virum et uxorem stante matrimonio*, though they flow from a third party, and are revocable *tacite vel expresse;* and the husband's lifting the money without his wife, and applying it another way, is a tacit revocation and declaration of his intention and mind to alter. See Dury, 21*st December*, 1638, *Laird of Craigmillar* and *Chalmers. Vide supra*, 9*th February*, 1672, *Laird of Balnamoon* contra *Jo. M'Intosh*, No. 321. And therefore the Lords suspended the charges upon the Commissary of Inverness's decreet of exhibition of that bond *simpliciter. Vide* Dury, 15*th January*, 1634, *Hepburne* and *Seton. Vide* the beginning of this Number, [p. 186.] See Leidington, 16*th June*, 1551, *Arnot* and *Douglas. Vide* 19*th November*, 1679, *Ferguson* and *Weyms; item*, 14*th July*, 1681, *Tolquhon.*

Upon reporting of this answer of the Lords, I contended, that Janet Cuthbert behoved yet to exhibit and give back that bond; because I having paid it *indebite* to her husband, as I might have condicted and repeated the money from him, and have made him warrant his own discharge, so she behoved *præstare illius factum*, being executrix confirmed to him; *et frustra petis quod mox es restituturus, et quem de evictione tenet actio eundem agentem repellit exceptio;* and, therefore, as representing the husband, to whom it was *indebite solutum*, she behoved to warrant his deed, and give up the bond. Whereunto it was ANSWERED,—That she being absolved, there was no libel *in campo*, and it was not competent *hoc ordine* to convene as executrix; but, whenever they insisted against her in a pursuit *super eo medio*, then she would give them a good answer, which was this,—that the inventory of the testament and her intromission was exhausted, partly by debts she had taken course

with, and partly by what was owing to herself as creditrix by the contract matrimonial, or otherwise. This answer Craigie sustained, and would not receive our new libel *hoc loco*.

Then I offered to find caution for her liferent of the sum in the bond, (which was all her interest in it, for the fee of the sum was uncontrovertedly elided and taken away by the discharge; for the husband could dispose upon the fee of the sum at his pleasure, and his heirs cannot reclaim, but might not evacuate his wife's liferent in it,) upon her delivering up of the bond, reserving repetition *per condictionem indebiti*, as accords of the law. This the Lord Justice-Clerk granted.

Advocates' MS. No. 647, § 4, *folio* 302.

1677. *November* 8. BARBARA GRANT *against* JANET CUTHBERT.

THERE was also another suspension, depending betwixt this Barbara Grant and Janet Cuthbert, determined at the same time, whereof the cause was this. Barbara Grant gets a liferent tack of a house in Inverness from her husband, at least so long as she does not remarry. Janet Cuthbert is pursued by her before the Bailies there, for the maill and duty of it, as she who possessed it from 1670, and is decerned in L.20 yearly. Janet having suspended this decreet, Craigie turned it to a libel, in regard, 1*mo*, The mandate of the procurator compearing for her was not mentioned in the decreet; yet that this is not relevant *separatim*, *vide supra*, *June*, 1677, *M'Mine* against *Newlands*, No. 576. *Vide* 12*th December*, 1676, *Christian Holmes* and *Marshall*, No. 518. 2*do*, That she was decerned for years wherein her husband was living, viz. from 1670 till 1674, promiscuously and confusedly, without distinguishing what years she possessed herself, and what years clad with a husband; and the libel was wrong drawn, craving her to be decerned *nomine proprio* for all, whereas she ought to have been convened for these years *nomine executorio*, which was not done; and though we offered to adminiculate the decreet, by condescending how long her husband possessed, and how long herself since; but it was refused. 3*tio*, That the term was not circumduced. Whereupon a commission was granted for proving the rent and her possession; who alleged, she behoved to have allowance for reparations.

ANSWERED,—She having right by a liferent tack, was not liable in reparations, but only the fiar.

This was repelled; only necessary reparations, and no other, were sustained.

Advocates' MS. No. 648, *folio* 304.

1677. *November* 8. MORISON of Prestongrange *against* His Tenant.

MORISON of Prestongrange sets a verbal tack of a muirland-grass roum he had to a tenant, for 1000 merks by year. In the winter 1673, the storm was so great and long that much cattle in Scotland died, and the labourers of such roums near lost all their stocking. Amongst the rest, Prestongrange's tenant representing his

loss to his master, he told him he should pay but 800 merks. The tenant has ever since possessed it these three years; and being charged for 1000 merks for the years subsequent to 1673, he says he bruiks *per tacitam relocationem;* and there was a novation of the old tack-duty, and he can pay no more but 800 merks yearly.

Prestongrange ANSWERS,—The tack being verbal, and only lasting for a year, there can be no tacit relocation, but where the tack is perfected in writ, which was not here. *2do,* The abatement must be presumed to have been singly for that one year, and not for the subsequent, wherein there was no ground to seek it; and the law is clear for this *in terminis terminantibus,* l. 15. § 4. *D. Locati,* where Papinian says, *Si uno anno remissionem quis colono dederit ob sterilitatem, deinde sequentibus annis contigerit ubertas, nihil obest domino remissio, sed et integra pensio illius anni quo remisit exigi potest;* which is yet stronger, because the one year compenses the other.

REPLIED,—Wherever there is a location, a relocation may take place. *2do,* If he had a mind, the old duty of 1000 merks should return to be paid for the subsequent years, then he should have interrupted by a warning, or some other declaration of his mind; for relocation is nothing but a presumption that both parties continue in the same mind, will, and inclination; till which be taken off by some contrary act, (*et qualis qualis insinuatio voluntatis* will serve, though it will not be sufficient to remove on, unless the warning be legal in all points,) the relocation stands. *Vide supra, June* 1674, *George Young* against *Cockburne,* No. 447.

Advocates' MS. No. 649, *folio* 304.

1677. *November* 8. MORAY of Skirling *against* ———

IN a case of Moray of Skirling's that was reported to the Lords, they found use of payment made to a minister of a greater duty than was contained in his tack or decreet of locality, (which might be for personal respects to him, but it seems protestation must be made thereon,) obliged the heritor, or payer, to continue the same quantity to his successor. It seems the Church quits nothing they once get. *Vide 22d March,* 1626, *Lennox of Branshogle.*

Advocates' MS. No. 650, § 1, *folio* 304.

ANENT SERVICES AS HEIRS.

1677. *November* 8.—This case was proposed. A man dies, leaving a land estate and two sons. The eldest goes off the country, and stays away seven or eight years, and no word of him whether dead or alive. Creditors, and others having little or no right, intrude themselves in the possession, and are more than twice paid of all their pretences. The younger brother has no title whereon either to debar them, or call them to count and reckon; *quid juris,* what shall he do? Some thought he might serve heir to the father. This was objected against; that *non constabat* whether his elder brother was dead or alive, and so no inquest could retour him nearest lawful heir, since there might be a nearer in life; (see David Melvill's case, who the Lords found could not be served heir to the estate of Leven, *supra,* No. 548, *20th February,* 1677;) and the *fama* there was an elder brother was enough, since *præsumitur vivere usque ad* 100 *annos, nisi probetur mortuus,* albeit

none appeared for him before the inquest. Yet services have been reduced in Scotland, on that reason, that there was a nearer on life; *ergo*, inquests have not scrupled in such cases to retour. But the most rational way, in such a case, were to give in a bill to the Lords of Session, representing the matter of fact, and craving a factory or other warrant from them, as *curator bonis*, to intromit and call others to account *ne res medio tempore pereunt;* upon caution to restore if the brother shall compear and claim his right. *Advocates' MS. No.* 650, § 2, *folio* 305.

Anent Consolidating Superiority and Property.

1677, *November* 8.—Where a vassal holds of a subject, and buys the superiority, to the effect he may hold of the King, or succeeds as heir of line to his vassal, *quæritur*, How the superiority shall be mingled and united with the property, it being the more noble and sovereign right. For consolidating the property with the superiority the way is easy and known, by a resignation *ad perpetuam remanentiam* in the superior's hands; but how the superiority shall descend to be confounded with the property, is not so easy. Sir John Nisbet advised, that the vassal should dispone the property to a confident person; and, being so denuded of the property, that then he who was his superior in these lands should dispone to him the superiority; (but *nudum jus superioritatis* cannot be conveyed alone, being *jus incorporeum, quod nequit per se subsistere*, without the lands be also disponed *cui inhæret;* as was advised by Sir Robert Sinclar in Smeton Hepburne's superiority, who took a disposition of it directly from Sir A. Ramsay, as having right to all the apprisings on the estate of Waughton;) which being done, then the trusted person to retrocess him again to the property, by which the property became an accession only of the superiority. But I see no absurdity in the making the superiority to come to the property, and there were too many *ambages et obliqui cuniculi* in this conveyance. Why may not the superior resign the superiority *ad remanentiam* in the Exchequer's hands, or *in favorem* of the vassal; to the effect it may be extinct, and he may have none interposed betwixt him and the King, but he may immediately hold of his Majesty?

If he be heir to his vassal, *quæritur*, If a special service will consolidate the property, without any more. For, in other cases, if one die specially served without a seasine, the next heir enters not to him, but to him who died last infeft.

Advocates' MS. No. 650, § 3, *folio* 305.

1677. *November* 8. The Commissaries of Edinburgh *against* The Executors of Robert Hamilton.

The executors or nearest of kin of Robert Hamilton in Newbottle having been charged by the Commissaries of Edinburgh to confirm his testament, they gave in a bill of suspension, on this reason, that he had *inter vivos* made an assignation and disposition of all his moveable goods in favours of ————; and so not being *in bonis defuncti*, but he denuded, they ought not to be confirmed. The Lords repelled, in November, 1677, the reason: both in regard the assignation was not intimated in the lifetime of the cedent, and that it bore a clause empowering the disponer to alter it at his pleasure; and so it was reputed to be but done in defraud of the confirmation, since it was not absolute.

Advocates' MS. No. 650, § 5, *folio* 305.

1677. *November* 13. Captain THOMAS WILSON *against* GEILLS FERGUSON and JOHN DALZEEL, her Husband.

CAPTAIN THOMAS WILSON pursues Geills Ferguson and John Dalzeel, her spouse, for payment of L.1138 Scots, owing for ale furnished by him to the said Geills her first husband, and then to herself.

ALLEGED for the defenders,—The account is prescribed by the 83d act Parliament 1579, since it was not pursued for within three years of the furnishing. ANSWERED,—Though the first articles of the account pursued on exceed three years, yet there are several articles of it within three years of the intenting this process, viz. some furnished in December 1673, and the summons is executed in November 1676, within the expiring of the three years; and there being a continued tract of trust, without interruption of a week all the space of the running account, it ought to be reputed as one entire debt, and have the benefit of an account-current, to be provable by witnesses. The defender OPPONED the act of Parliament.

This point being taken to interlocutor by Craigie, and enforced in the informations to the Lords, from sundry grounds in law, (which are to be seen in the information,) and particularly from Joannes a Sandes *Decisiones Frisiæ*, lib. 5. tit. 6. definit. 2. the Lords sustained the currency of the account *qwoad* the whole, and repelled the allegeance, in respect of the answer.

Then it was ALLEGED for the defenders,—That as to those articles of the account that fell within the three years preceding the citation they would not controvert but the same might be proven *prout de jure;* but as to the furnishing that was without the three years, it could not have the same privilege, unless the pursuer would offer to prove, not only the furnishing and delivery of the drink, but likewise that the price thereof was yet resting owing unpaid, and that only *scripto vel juramento* of the defender: otherwise it would be of a most dangerous consequence, if, upon the pretence of a current account, (suppose of 30 years together, whereof the last two or three articles are within the triennial prescription, and all the rest prescribed,) it were sufficient to prove single delivery and furnishing of ale *prout de jure* and by witnesses all that space, without proving that the same is owing, whereas it is to be presumed that much of it is from time to time paid. (See *4th June*, 1679, *Ewart.*)

ANSWERED,—The pursuer opponed the Lords' interlocutor, by which they had found he was in the case of a current account, and that the currency was sufficient to interrupt prescription; and in all debts that had *tractum temporis*, it is the last act that consummates and makes up the conjunction of parts, and one entire debt; and the pretended inconveniency meets not here, where the oldest article is not above seven years; and the inconvenient on the other hand is to be pondered, that this would tend to loose all confidence and society. And to oblige them to prove, in such a case, that the debt was yet resting owing unpaid, were to prove a negative, which, *de jure*, proves itself, except they subsume on payment. And, likewise, it would evacuate the act of Parliament, that allows all counts that are really within three years, or by law and interpretatively reputed such, to be proven by witnesses; and this allegeance downright contradicts the Lords' interlocutor.

The Lords found the whole count probable by witnesses, and that the pursuer needed prove no more but the delivery of the drink.

Then ALLEGED absolvitor for the defenders,—Because they offered them to prove by witnesses beyond exception, that the general and known custom of the

whole brewers of Edinburgh is to count with their customers and clients (callants) by two nick-sticks, one kept by either party; and that, when they pay the brewers, they get no other discharge but the breaking of the said nick-sticks, which is esteemed equivalent to a discharge. And that *de facto*, in this case, he offered to prove, by the pursuer's servants and several others, that there were nick-sticks from time to time used betwixt the pursuer and defenders; and that, accordingly, they counted with the pursuer and his clerk to the brewery, called Alexander Wilsone, and thereupon the whole nick-sticks were broken of consent of the said clerk. ANSWERED for the pursuer,—That the lawyers told us of many ways of probation, either for constitution or dissolution of debts, as *scripto, juramento, per testes, confessione, per adminicula et conjecturas*, but I had never met with the probation by nick-sticks; that being *vana et levis præsumptio*, and used only *tanquam libri idiotarum* by such as could neither read nor write, and not by such as kept count-books; and nick-sticks could be no sure rule, since they were kept by the most inferior servants, who carried the ale to the customers' houses. See the answers beside me.

The Lord Craigie found the allegeance thus complexly taken, relevant, viz. that it is the general known custom of all the brewers of Edinburgh to count by nick-sticks only with their customers and clients, whereof one is kept by the brewer and the other by the customer; and that when the customer or client pays the brewer, they get no other discharge but by breaking of the nick-sticks, to be proven by famous witnesses beyond all exception; and that there were nick-sticks used from time to time betwixt the defender and pursuer, to be proven by the pursuer's servants or others; and that thereupon the whole nick-sticks were broken, and that after counting with the clerk of the brewery, in presence of the pursuer or his said clerk, they being silent and not contradicting, to be proven *prout de jure*.

I ALLEGED, his consenting to the breaking the nick-sticks could only be proven by his oath or writ, since it was *magis actus animi* than *facti;* and naked consent fell not *sub sensu aliquo corporeo*, upon which witnesses can only depone; and that it might be easily mistaken, and as liable to it as promises were, which, therefore, our law permits only to be proven *scripto vel juramento*. Yet Craigie sustained it relevant that they were present, silent, and not contradicting; seeing *qui tacet in actu eum tangente, et quem impedire potest, sibi præjudicat, et consentire videtur*. See Dury, *26th July*, 1631, *Shaw* and *Bishop of the Isles, L.* D. *De Regulis juris*. And so he found it probable by witnesses.

Then the defender ALLEGED,—That some of the ale in the count was furnished in her first husband's time, and he being dead, and she not representing him, she could not be liable. ANSWERED,—The allegeance ought to be repelled; because she was not only *præposita negotiis*, (but this makes her husband's representatives liable,) but also had accepted of a disposition from her first husband with the burden of his debts, at least of this. The Lords found this of the disposition relevant. But what if she ascribe her possession to a right of liferent, and not to this disposition, and so elude the passive title? 1*mo*, Her taking seasine was an using of that disposition. 2*do*, Then let her renounce her disposition of property, that the pursuer may have access to affect the same. The seasine alone will not prove, though it bear the right was clogged with the debts, for it is only *assertio notarii*, and the ground of it in the defender's own hands must be produced.

That same day having been assigned to the defenders for proving their exception and defence about the nick-sticks that was assigned to the pursuer for proving his libel and the furnishing, and the diligence for proving the said defence not being

debite executed to the day, and so the term being circumduced against them for not proving; they gave in a bill to the Lords, bearing, that in case the pursuer had led no probation for proving his libel, they had no necessity to prove their defence that elided it; and that the pursuer had only on the very day of the act led his witnesses, so that they were secure till then; and that he had a diligence; therefore craved the day might be prorogued to him for proving his exception. The Lords granted them a farther day for leading their witnesses, providing they closed their probation before the pursuer's probation came to be advised, so that he might not be delayed; otherwise, the Lords declared, they would have no respect thereto. It seems, indeed, to be an error in our form, that where both a libel and exception are admitted to probation, one day should be assigned for proving of both; for there should be a longer day given to the defender in that case, to the effect he may first see whether the pursuer proves his libel or not; for if the pursuer prove it not, why should we burden the defender with the superfluous probation of his exception?

This action, and its probation, came to be advised in the Innerhouse on the 26th of February, 1678, (so that in the space of four months and less the haill process was carried on and the same advised by the course of the roll,) and the Lords found the pursuer's claim and furnishing, with the passive title of accepting a disposition, fully proven; and the defence upon the custom of the nick-sticks, &c. not proven; and therefore decerned. *Advocates' MS. No.* 651, *folio* 305.

1677. *November* 13 and 14. THE KING'S ADVOCATE and SOLICITOR *against* STRAUCHAN of Kinnaldy.

November 13.—THE Advocate, and Sir William Purves as his Majesty's Solicitor, pursues Strauchan of Kinnaldy for the casualty of ward and marriage, fallen by the decease of ——— Bannerman of Elsick, who stood last infeft as the King's vassal in these lands, and who had disponed them in favours of this Kinnaldy a little before his death. *Vide supra*, No. 571, *Alex. Arbuthnot* against *Barclay*, 14*th June*, 1677.

It was ALLEGED,—That no casualty was due by Elsick's decease; because he was denuded by disposition, whereupon resignation had followed in exchequer before his death; and so the King having accepted of his resignation in favours of a third party, Elsick was denuded and discharged of any thing could befal the King by his decease, and the other came to be in place of vassal. Whereunto it was

REPLIED for the King, by Sir George M'Keinzie, his advocate,—That the rule in law to know if those casualties of ward and marriage were befallen to the superior, yea or not, was, to consider whether the person by whose decease they are contended to be opened and devolved, stood last infeft, yea or not; or if he had infeft another publicly holden of the superior. And it impinges on the principles and foundations of the feudal law to assert, that a naked resignation, without any more following thereon, does so denude, as to intercept the casualties falling by the decease of the resigner; for however these casualties be odious, and so not to be extended, yet this is no stretch, but a most natural and genuine consequent of feudal rights; by which a resignation is an incomplete step, and gives no real right to the property,

till it be perfected and consummated by infeftment; and affords no more but a personal action at the instance of him in whose favours the resignation is made, against the superior, to grant a charter upon his acceptation of the resignation; so that the *jus in re*, or *dominium*, stays with the resigner till the resignation be perfected by infeftment following thereon; and till then the resigner is never fully divested. Whereof this is an unanswerable demonstration, that if the resigner make a second resignation in favours of another person, and he perfect his resignation by passing infeftment before the first, he will be preferred in law to the other party, in whose favours the first resignation was made and accepted. And that this is undoubted law, and never questioned till now, appears from Craig, whose opinion is of no small authority. He, page 318 *et seq.* tells us, a resignation consists *ex tribus partibus*,—the act of resignation,—the superior's acceptation,—and, lastly, the charter, and the tradition and investiture given to him in whose favours the fee was resigned; and he adds, *Nihilque operatur resignatio donec totus absolvatur actus, nec resignans interea dominio privatur;* than which there can be nothing more expressly positive and clear.

On the 14th of November, 1677, the Lords advised this debate, after it was resumed by my Lord Pitmedden as his trial in the Innerhouse, conform to the act of sederunt, before his admission, and that he had given his judgment in it first. The Lords sustained the summons of declarator, and repelled the defence, in respect of the reply; and found the naked resignation did not stop the falling of those casualties upon the resigner's death, unless infeftment had been expede on the resignation likewise before his death.

Sir George Lockhart, though he was for the defender, yet wondered if the Lords could make any stop and demur on so clear a case, as to give it a large hearing in their own presence; and remembered a stronger defence than this was repelled in *December* 1668, or *January* 1669, in the declarator *Duke of Hamilton* against *David French and the Tenants of Milneburne;* which *vide supra*, at great length, [Vol. II, page 450;] viz. that one having apprised his debtor's land, charged the superior to enter him, who delayed; *medio tempore* the debtor dies; the lands holding ward, and the superiorac claiming the ward. It was contended by the appriser, that the charging the superior was equivalent to an infeftment, and so behoved to stop the ward, as it would have done; and yet the Lords repelled this.

Advocates' MS. No. 652, folio 306.

1677. *November* 13. THOMAS SIBBALD *against* MARGARET RIDDOCH.

THOMAS SIBBALD, writer in Edinburgh, obtains a decreet against one Margaret Riddoch, before the Bailies of Edinburgh, holding her as confessed, upon the maill and duty of a house possessed by her, and whereunto he had right by apprising. This decreet was suspended on this reason, that she being only a tenant, and holden as confessed on an exorbitant quantity, it was craved she might be reponed to her oath, at least they might be put to prove her libel, she being a widow woman, and ignorant. ANSWERED,—The decreet is opponed, bearing her to have been personally apprehended, and the rent decerned for was but small, and she

wanted a reduction; and at this rate there should never be a decreet in absence but it might be sought to be turned into a libel; and he was not bound to consent to it, or accept the expenses of his decreet, but he *mordicus* adhered to it.

Some Lords would not have stuck to have reponed her; but Newton, who is *strictissimi juris*, affecting *Scævola et Africanus* religious severity in following the law closely, refused, though there had been a reduction, since there was no probable cause alleged for purging her contumacy.

Advocates' MS. No. 658, folio 307.

1677. *November* 14. WILLIAM HALIDAY *against* JOHN CHRYSTIE.

WILLIAM HALIDAY, servitor to Sir A. Ramsay, charges John Chrystie to pay 400 merks, contained in his bond. He suspends,—That the charger, with some other of his creditors, had subscribed a letter, (which he also produced,) declaring they were content to accept a disposition from him to his lands in Culross, &c. in satisfaction of their sums; which condition he accepted, and was willing to give them a disposition, and consigned it.

ANSWERED,—The words are nowise obligatory, and being in a matter of heritage there was *locus pœnitentiæ* aye till the writs were drawn, signed, and delivered; and they had *de facto* resiled upon very rational grounds; which see deduced *ad longum* in the information. See Stair's Decisions in *July*, 1663, between *Skelmurly* and *Brown*. Stair's System, tit. 10, p. 99.

This case being reported to the Lords on the 20th of November, they found the letter not obligatory upon the charger, unless the other creditors, subscribers thereof, were willing still to adhere, and give the said debtor-suspender the benefit of that same offer; and allowed him to produce, betwixt and the 20th of December next, a declaration under their hands, intimating their willingness to abide at the contents of that letter. And he not having procured any such testificate betwixt and the day assigned, the Lords thereafter found the letters orderly proceeded simply.

Advocates' MS. No. 654, folio 307.

1677. *November* 14. FORBES of Waterton *against* The BISHOP OF ABERDEEN.

THE declarator anent the patronage of the kirk of Ellon was debated betwixt the Bishop of Aberdeen and Forbes of Waterton. See a little of it, No. 608, [Historical Volume, 19th July, 1677]. On the occasion of this competition, many lawyers were of opinion, that it were most conducive and expedient that the King had all the patronages of churches in Scotland; and the bishops, in their respective dioceses, to have the presentation and filling of them as his Majesty's deputies, and keepers of his conscience in this particular.

This case was my Lord Harcours his Innerhouse trial.

The Lords having advised it on the 21st of November, their interlocutor resolved in an act before answer, ordaining all parties to produce what writs or other

documents they have, for clearing and astructing the right of the said patronage; and, in the mean time, appointed the kirk to be supplied by the bishop, because Waterton as yet has shewn no right to it standing in his person, and is not as yet infeft. *Vide supra*, about a patronage contraverted between *Southesk* and *Northesk*, *in fine*, No. 572, [*14th June*, 1677]; as also *infra*, [No. 658, 20th *November*, 1677,] between the *Town of Hadington* and the *Earl of Hadington*.

Advocates' MS. No. 656, *folio* 308.

1677. *November.* ACTS OF SEDERUNT.

THE Lords enacted, that parties who minded to complain of interlocutors given in the Outerhouse, should do it within twenty-four hours, otherwise that they consign a dollar with their bill, by way of amand, not to be returned though the bill be granted. *2do*, That qualified oaths should be immediately discussed as to their intrinsic qualities and competency; because by the reservation of these debates to the conclusion of the cause, the Lords found themselves exceedingly retarded in the advising. But this has not yet taken full effect. *3tio*, That informations be given in at the advising of concluded causes, that being the most critical period of them. See this enlarged *alibi*. *Advocates' MS. No.* 657, *folio* 308.

1676 and 1677. The HERITORS and TOWN OF HADINGTON *against* The EARL OF HADINGTON.

1676, *December*.—THE Duke of Lauderdale, Clerkington, Barns, and sundry other gentlemen, heritors within the parish of Hadington, raised a declarator against the Earl of Hadington, and Mr James Forman, whom he had presented to be second minister at the kirk of Hadington; to hear and see it found and declared, that the patronage does not belong to the said Earl, and therefore the said minister to be removed. This last part of the summons, I think, will hardly be sustained; for Hope, in his Collection, lib. 2. tit. 14. Of the Patronage of Kirks, fol. 78, shews the incumbent will bruik the benefice during his life, albeit the patron's right be reduced; but the first alternative is unquestionably relevant.

Advocates' MS. No. 517, § 10, *folio* 268.

1677, *November* 20*th*.—IN the declarator, mentioned *supra*, [*Number* 517, *Section* 10,] at the instance of the heritors and town of Hadington against the Earl of Hadington, that he hath no right to present the second minister of Hadington; the Lords advised the dispute this day; and finding that there was no writ produced anent the constitution of the second minister's provision, they, before answer, ordain either party to adduce what probation or evidences they can, for clearing *quid vere actum erat* at the first settlement of the second minister; if his provision should have been by voluntary contribution, or if the same should affect the teinds; and if there was any decreet of the commission for plantation of kirks in relation

to the said provision; and whether Mr William Trent was presented by any of the parties, or how he came in.

Upon this both parties took out diligences, and led witnesses. See the informations beside me, and the practique of Dr Reid's heirs their right of presenting the bibliothecar at Aberdeen; and how far the *jus patronatus* is *individuum*, that he who presents the first, must, by necessary consequence, have also the second, if another minister be judged necessary at that place. Some thought the rights of all parties so obscure, that it might be reputed a waiff patronage, and as caduce devolve to the King, none of the pretenders having a clear title thereto.

Advocates' MS. No. 658, *folio* 308.

[See the subsequent parts of the report of this Case, Dictionary, p. 9903.]

1677. *November* 21. MINISTER of Tillycoutry *against* NICOLSON of Tillicultrie.

THE minister of Tillycoutry pursues Nicolson of Tillicultrie, before the commission for plantation of kirks, for an augmentation of his stipend. Against which it was offered to be proven, by the minister's oath, that he had promised to his parishioners faithfully never to seek an augmentation; and he confessed the promise judicially at the bar. Yet the Bishops of St Androis and Galloway forced the commission to decern an augmentation, on this pretence, that the promise was *super re turpi vel illicita*, and granted through ignorance and simplicity; and that it was their part, though he were not seeking it, to provide churches with competent stipends. It was not denied but they might augment, to take commencement after his incumbency, and that his promise was only personal, and could not prejudge his successor, they being but administrators of the benefice; but it was *inauditum et contra bonos mores* that it should not tie himself, and he coming against his promise *exceptione doli mali repelli et summoveri poterat; et in omnibus grave est fidem fallere, multo magis* in a churchman, who ought to be patterns of faithfulness and all other virtues. What if he had sworn not to seek an augmentation? It is like the bishops would have absolved him, as they did dispense themselves from the oath of the Covenant. See a case somewhat like it, in my Summary of the Commission Books. *Advocates' MS. No.* 659, *folio* 308.

1677. *November* 23. AGNES CRAWFURD, and her CHILDREN, *against* ALEXANDER KENNOWAY.

ALEXANDER KENNOWAY had become cautioner in a contract of marriage, for the husband's obligements in favours of Agnes Crawfurd, the wife, and the heirs and bairns to be procreated of that marriage. There are children; and the father dying, Alexander is charged to fulfil. As to the wife's liferent, he cannot evite the securing her in that; and if the other part of the obligement had only mentioned *bairns*, without adjecting the word *heirs*, there would have been as little doubt but he would have been liable to the bairns likewise. But his defence against them

was, Ye cannot have right to this provision till ye be served heirs; and, *qua* heirs to your father, you are obliged to relieve me, who was only cautioner for your father; and so *confusione tollitur obligatio: et quem de evictione tenet actio eundem agentem repellit exceptio; et frustra petis quod mox es restituturus.*

This allegeance the Lords sustained, that ere they could seek implement, they behoved to be served heirs, and then they would be obliged to relieve: and therefore assoilyied from the pursuit.

This evacuates all cautionaries for provisions to heirs in contracts matrimonial; but it is only done to discourage such inept conceptions of these clauses. The title *Codice, Ne fidejussores dotium dentur*, aims elsewhere. Mr David Dinmuire, advocate, was just engaged in the parallel case to this. *Vide* this case argued *supra*, No. 555, § 6, [*February*, 1677.] *Advocates' MS. No.* 661, *folio* 308.

1677. *January* 10, *June* 16, and *November* 27. STEWART of Castlemilk *against* The DUKE OF HAMILTON and SIR JOHN WHYTFORD of Milneton.

January 10.—DUKE HAMILTON and Sir John Whytford of Milneton's defences against Stewart of Castlemilk's reduction *ex capite metus* being this day advised, the Lords allowed a conjunct probation as to the spontaniety of the deed; yet upon the matter they rendered Duke Hamilton's probation ineffectual, by declaring they would not admit those same witnesses whom the pursuer should make use of to prove the compulsion, fear, and force, to prove his being at liberty, but the Duke behoved to use others; whereas there was no others that knew ought of it save whom the pursuer intended to make use of. They took Castlemilk ere the caption came; they carried him not to a prison, but two or three days, one after another, to private houses, which was *carcer privatus*; and instead of taking from him an obligement to fulfil the will of the horning and caption, they presented him a disposition of his estate, and undertook to pay debts for him, and constrained him to sign it. In this cause it was, that the Lords debated if the Duke should be permitted to come within the bar, and sit with his hat on; *item, de alienatione litis in potentiorem;* which see in the observes anent Session emergents, on the 19th of December, 1676. *Vide supra*, No. 278 and 279, in December, 1671, *Spalding* and *M'Intosh.*

On the 16*th of June*, 1677, the Lords advising the probation led, found the reason of force clearly proven, and therefore reduced the disposition; for it is the interest of every private man to be compelled to do nothing but according to law. Yet if a man be owing me money, and I by threats compel him to pay me, as was in this case, there will be no *repetitio* or *condictio* of what is paid. Yet *vide* l. 7. C. *Unde vi.* *Advocates' MS. No.* 532, *folio* 272.

1677, *November* 27.—Duke Hamilton's action and Castlemilk's was this day advised. The Lords decerned Duke Hamilton to cede the possession to Castlemilk: albeit the commencement and entry of his possession was not by that disposition they had reduced, but by a gift of liferent escheat, and by an assignation to a lady's liferent, which was now extinct by her death; *et resoluto jure dantis, re-*

solvitur et jus accipientis; and the escheat was not declared, and so he had no title whereto he could ascribe his possession, but only that disposition now reduced *ex capite vis et metus:* But reserved to the Duke all his other pretensions on the land. Some cried out on this interlocutor.

Advocates' MS. No. 662, folio 309.

1677. *November* 27. CARSAN *against* MAXWELL.

CARSAN obtains a decreet for making arrested goods forthcoming, before the Stewart of Kirkcubright, against Maxwell; who suspends,

1*mo*, It bears no dispensation. ANSWERED, The defender was compearing in the decreet, and so had acknowledged, founded, and prorogated the jurisdiction, without proponing that dilator; *et primus actus judicii est judicis approbatorius.* And it was within ten days of a head-court, at which time inferior judges need no dispensation. REPLIED, The compearance is disclaimed as officious, simulate, and patched up; and the decreet bears not that the procurator compearing for him had a mandate. DUPLIED, A mandate was presumed, and the decreet needed not bear it. Yet see *supra*, No. 576, *M'Min* and *Newlands*, [19th June, 1677.]

Their second and third reasons of suspension were, that the decreet was intrinsically null, because it bears defences were repelled, and does not tell what they were, only because the judge knew them to be frivolous and dilatory. *Item*, that compensation was proponed and repelled.

But the reason of this was because it was proponed generally, without a special condescendence whereon the compensation was founded. I offered to admit any relevant exception of compensation, or otherwise, providing it were instantly verified. Which they failyieing to do, after several side-bar callings, the letters were found, by my Lord Strathuird, orderly proceeded.

Advocates' MS. No. 663, *folio* 309.

1676 and 1677. JOHN HADDOWAY *against* ——— INGLIS and WILLIAM SOMERVELL.

1676, *December* 12.—IN an action for mailis and duties, pursued by John Haddoway, of some lands beside Douglas, compeared one Inglis and Mr William Somervell, and competed upon another infeftment; wherein possession being admitted to Haddoway's probation, he, for proving his infeftment was clad with possession before their right, produced, 1*mo*, A discharge of the feu-duty from the Marquis of Douglas, superior. The Lords found, at the advising, this alone was not a sufficient proof of possession. 2*do*, He produced a holograph discharge, granted by him to the tenant possessor of the land of his year's rent.

The Lords found such discharges were not probative of any man's possession, because it did not prove *quoad datam*, and might have been recently granted after

Inglis's right; but the Lords allowed him to adminiculate the date of it by the tenant's oath.*

Whereupon the tenant compearing, the other party declared they resiled from his oath, and deferred it to Mr Haddow's own oath. It was contended, that could not be, since the oath was deferred to the tenant for astructing the reality of the date of the discharge, as it bore by the Lords and not by the party; and so could not be altered or resiled from, or deferred back to Haddow's oath. However, Mr Haddow being content, on oath asserted the discharge was of a true date, and was then subscribed, and he got the rent. But they put in another interrogatory, viz. if it was then delivered to the tenant, or ever became his evident. He refused to answer thereto, as not pertinent.

However the Lords, on a bill given in by Inglis, ordained him to be examined on that interrogatory; and a day being assigned to him to appear, he failed, being hindered by the great storm; so the term was circumduced against him, and the decreet hastily extracted the day after he came to town. What straitened him was, that after he had subscribed the discharge, he told the tenant he might have use for it to astruct his possession, and therefore would keep it. *Quæritur*, if this will equivalently amount to a delivery *per fictionem brevis manus*, since there was no simulation.

Inglis farther craved to be preferred, because he had an inhibition executed against Haddow's author before his right, and thereon had a reduction depending. Which the Lords receiving *hoc loco* by way of exception, we were forced to propone, 1*mo*, against the inhibition, that the executions were false, and offered to improve them. 2*do*, That they designed not the party inhibited his dwelling-house. The Lords permitted them to take up their executions as to that part and mend them, they abiding at it. 3*tio*, That it was still null, because it did not bear that a copy of the letters of inhibition were affixed and left at the Market-cross, as is done in hornings and other such solemnities. ANSWERED,—Not essential. The President called it a new point; and the Lords, before answer, ordained both parties to produce either practicks, if any were, or executions of inhibitions, to see whether that custom be more frequently used and inserted or omitted; and Haddow having produced ten or twelve he had borrowed from messengers and others, they all bore a copy left at the Market-cross. See the point of law urged from many parallels in the information.

The Lords demur what to find as to bygone executions, whether that informality shall annul them or not; but, *pro futuro*, on the 20th day of December, 1676, they made an act, (and yet I find it not inserted in the sederunt books,) that in all time coming the executions of the publication of inhibitions shall bear a copy to have been affixed on the Market-cross, otherwise they shall be null.

The President's manner is, when any new point occurs to be decided, he runs over all the practicks new and old, but particularly since the King's restoration in 1661, to see if he can find it either decided already, or any parallel or contingent help; which speaks his indefatigableness.

Advocates' MS. No. 520. folio 270.

* And thus, in March 1677, Sir Jo. Cunygham advised the renewing of Mr Jo. Ramsay, minister at Markinch, his holograph disposition to David Ramsay, because it would not prove *quoad datam*, and so would be presumed to be done *in lecto*, unless it were adminiculated by persons that saw it and read it before his sickness in his *liege poustie*; and the proving it to be his hand-write is not enough.

1677, *November* 29.—In the foresaid action mentioned *supra*, [No. 520.] between John Haddow, and Somervell, and Inglis, decreet having been given forth against the said John, upon a circumduction of the term, for his not compearing to depone anent the delivery of the discharge; he presented a bill of suspension; which being debated before Reidfurd, and reported by him, the Lords reponed John Haddow again to his oath against the said decreet, because he was impeded *vi majore* and by the storm from coming in; and that the decreet was disconform to his oath, decerning him for more years than he had possessed, and for a greater duty than he had acknowledged by his oath, notwithstanding they offered to restrict it to the precise years and quantity mentioned in his oath.

Of this decreet we had also raised a reduction; and which being called by the order of the roll, and insisting that the defender might take a day to produce the decreet, it was ALLEGED, they would take no day, because it being a decreet *in foro contradictorio*, the defender is not bound to produce it, though he hath extracted it, but the pursuer is bound to extract it when it is a decreet *parte comparente* before the Lords, and to produce it himself. But after the Lords reponed John Haddow, we had no use for our reduction.

Advocates' MS. No. 665, *folio* 309.

1677. *Nov.* and *Dec.* OLIPHANT, &c. *against* HAMILTON of Wishaw.

Nov. 30.—HAMILTON of Wishaw's case was debated, viz. He acquires a right to some apprisings on Antonia Brown of Fordell's estate. She has right to redeem by law, and our act of Parliament 1621, (because she was then minor,) any time till she be twenty-five years old; and the legal does not expire against them till then, being yet *intra quadriennium utile*. John Oliphant, being another creditor of hers, apprises the legal reversion from her of Wishaw's apprising; and John dies, and leaves a child behind him minor. Antonia Brown becomes not only major, but her twenty-fifth, and *quadriennium utile*, expires. Oliphant's heir, the co-creditor, and other appriser, who is minor, uses an order of redemption against Wishaw; and when he comes to seek a declarator upon his order of redemption, Wishaw's defence was, that his order could not be declared for redeeming him, because before that order was used his legal was expired by A. Brown's majority, and arriving at twenty-five. ANSWERED,—Antonia was denuded of the reversion by Oliphant's comprising, and he stated in it; and, since his heir was minor, the legal could not expire against him neither, according to the sound principles of law in favours of minors.

The question was, if a co-creditor's minority stopped the statutory prescription of the ten years legal reversion in apprisings from expiring, as well as the minority of the debtor against whom it was led did.

December 4th.—The Lords advised this case, which is altogether new, and not formerly decided, *et omnes una voce, excepto* D. Castlehill, found the minority of co-creditors, or other singular successors to the minor, (who had apprised the minor's right it may be,) stopped the legal from expiring; though the act of Parliament 1621 seems only to mean the debtor's universal successors as heirs. However, this may hinder an apprising from expiring for forty years toge-

ther; and the decision surprised sundry. See the informations *ad longum*, in my folio law MS. *C.* See thir parties, 20th November, 1678, [volume fourth of this Work, p. 247.]

Advocates' MS. No. 668, *folio* 309.

1677. *November* 30. JOHN ANDERSONE *against* WILLIAM ANDERSONE, his Brother.

IN the count and reckoning pursued by John Andersone, baxter, against William Andersone, merchant, his brother, as executor confirmed to Robert Andersone, factor in Campheir, their brother, for making payment to him of an *annuum legatum* of 350 merks yearly, left by Robert to John in his testament;

William ALLEGED,—He could not pay it, because the inventory of the testament was exhausted by payment made to lawful creditors before his citation; and gave in the articles of his exoneration. Against some ALLEGED, they ought not to be allowed, because paid voluntarily without a sentence. ANSWERED, It was sufficient to exoner against a legatar, though it would not operate against a co-creditor. My Lord Pitmedden being auditor, found (which the Lords had also frequently decided *in presentia* before) that voluntary payment by an executor to creditors was sustainable, without necessity of a sentence, where it was only objected by a legatar.

Against another article, paid by him to a creditor, it was OBJECTED,—It could not be allowed; because it was offered to be proven, by the oath of the creditor to whom it was paid, and who grants the discharge of it, that the said debt was truly paid to him by the defunct in his own lifetime, and that this executor has only, to absorb the defunct's means, prevailed with him to renew the discharge in his name, and of a date posterior. ANSWERED,—The discharge is opponed, bearing the payment to have been made by the executor, and since the defunct's decease, and he abides at it as a true deed; and the creditor's interest now being extinct, he can no more depone to the executor's prejudice, than a cedent can do in prejudice of his assignee for onerous causes. See *2d December*, 1683, *Bayne* and *Young*, and the citations there.

The Lords found, (Pitmedden being reporter,) the creditor might be examined on the payment made to him by the defunct, and anent the executors giving them up the former discharges and taking new discharges or assignations to himself, providing the executor first depone that he knew when he paid them there was a tract of a correspondence and trade betwixt the defunct and these creditors; or else that John, the legatar prove it; and burdened John Andersone, the pursuer, with reporting the commission for taking the creditors' oaths, who lived in Holland and Zealand. This the Lords did the more clearly, that they suspected the ingenuity of this executor in this affair. See Menochius *de Arbitrariis Judicum*, lib. 2. centur. 1. cap. 91, 92, and 93. See statute 12, anno 7th Jacobi regis, anent tradesmen's books being probative in England for a year.

The Lords also (*referente Domino* Pitmedden) refused to allow compensation to John, the pursuer, upon Robert's count-book, wherein he had written, that his brother William was debtor to him in L. 200 sterling; which the Lords found no

sufficient probation. See a note from Mascardus, *De Probationibus*, conclus. 977, *et seq.* verbo *Liber*, how far merchants' books prove against third parties; and of the qualifications requisite to make them instruct and constitute a debt. The Lords also found this legacy was not alimentary, nor priviledged so as to have any preference to be deducted before the other legacies, notwithstanding of sundry particulars condescended on why it should have preference, (which see in the informations;) but the Lords brought it only in *pari passu* with the rest.

Item, A debate arose upon one of the receipts produced, acknowledging payment from William, the executor, but thus qualified, "Out of the cash of the bank of Midlebrugh," which was contended to have been Robert's own money. ANSWERED, The allegeance was weak and frivolous. See this, and many other points and articles, discussed and determined in this count and reckoning, in the informations beside me. See Stair's Decisions, 17*th January*, 1662, *Andrew Willage;* but especially 20*th November*, 1662, *Wardlaw* and *Gray*. *Vide elegantem Legem* 7. C. *De Probationibus*. Mascardus *de Probationibus*, conclus. 977.

On the 24th of January, 1678, another point went to interlocutor, viz. whether William Andersone, the executor, ought not to have the third of the dead's part, for executing the office, since he was not a descendant of the defunct's body, and so *quadantenus* a stranger; especially the retention being craved not against a creditor, but only a legatar; and since, conform to the act of Parliament in 1617, he was content to allow any legacy left him in the fore-end thereof. Yet the Lords found he was not a stranger executor, and so ought to have no third.

What was Robert Andersone's wife's share in his moveables, (which was given up as an article of exoneration,) the Lords ordained the custom of Zealand therein to be proven by the declaration of the supreme judges there; and that Robert had a free estate, *scripto*, by his count-books, or otherwise; and found, that *nomina debitorum* followed his domicil, and so, albeit they lay in Scotland, the relict had right to a third, or other proportion thereof.

Advocates' MS. No. 669, *folio* 310.

[See the subsequent part of the report of this case, Dictionary, p. 11509.]

1677. *July* 27. The EARL OF WINTON *against* The MARQUIS OF DOUGLAS.

IN the former session there being a point taken to interlocutor, in the count and reckoning at the Earl of Winton's instance against the Marquis of Douglas, the Lords found the disposition made by the Earl of Angus to Dundonald, mentioning the wadsets, real rights, and other incumbrances on the estate of Paisley, amounting to L.108,770, did not prove the said incumbrances *per se*; but ordained the Marquis to prove them *aliunde*, by producing these wadsets and other creditors' rights, and gave him an incident for that effect: notwithstanding it was alleged for the Marquis, that since the said disposition was made use of for instructing of the charge, the same also might be made use of for instructing the incumbrances; which the Lords repelled, 1*mo*, Because no writ proves *pro scribente*. 2*do*, If the disposition had affirmed that the haill price of L.162,000 was exhausted by real debts, that narration could not have frustrated Winton's relief.

Advocates' MS. No. 670, *folio* 310.

1677. *December* 5. The EARL OF DUMFERMELING *against* The EARL OF CALANDER.

THE Earl of Dumfermeling being dead, and his brother, who succeeded to him, insisting in that famous process against the Earl of Calander, it was ALLEGED, He behoved to transfer. ANSWERED, He needed not, for he had an assignation to the process from his brother, and so he now insists as assignee.

REPLIED,—1*mo*, It was on death-bed, and not intimated *in vita defuncti*. 2*do*, It was not judicially produced in process in his lifetime, and so cannot summarily give him a title.

Yet the Lords sustained it, and would not so put him to the necessity of a transferring as to give it out and enrol it *in communi forma;* but to be seen in the clerk's hands, and immediately call it as an act; which was little or no delay. See 10*th January*, 1679, *Auchmouty* and *Dumfermeling*.

Advocates' MS. No. 671, *folio* 310.

1677. *December* 8. ANTONIETA PYRONON *against* GEORGE MORISON of Pitfour.

ANTONIETA PYRONON, as executor confirmed to John Peironnoun, broker in Bordeaux, her father, having obtained a decreet against George Morison of Pitfour, as oy and heir by progress to George Morison, provost of Aberdene, for L. 2000 or thereby, resting by the said provost to the said John Pyronon, and which was proven to be resting by the said George's latter will and testament, where, from a touch and remorse of conscience, he acknowledged that debt, which had been long concealed; she did thereafter pursue this same defender for the annual-rent of this principal sum, upon this ground of fact and law, that brokers' money, by the law and custom of Bordeaux, bears annual-rent. And the custom having been sustained relevant formerly to infer annual-rent, and a commission directed to Monsieur La Vi for proving of it at Bordeaux; and the same being advised this day, the Lords, by the report, found the custom sufficiently proven, and therefore decerned for the annual-rent from the time of John Peironnon's decease, which was in 1631; and so found annual-rent due, though there was none in the bond, decreet, or rather in the testament by which the debt was proven; and that in respect of the custom of brokers at Bordeaux to get annual-rent for the monies they advanced to merchants. But thereafter, on a supplication given in by the defenders, the Lords, on the 5th of February, 1678, restricted the annual-rent to the time of Provost Morison's decease, which was in 1658, on this reason, that there being no other probation but his confession in his testament, declaring such a sum in the general to be resting, it was to be presumed and understood, that with the same ingenuity he confessed the principal, he would likewise count the annual-rent. (They found, the only probation of the debt emitted being his confession *ob levamen conscientiæ*, it was to be presumed he had confessed all that was due *calculo rotundo*.) But he would not dream of any annual-rents due, nor mind the custom. See a note of

this Antonieta Pyronon's process *alibi*. See our informations, with their bill, and our answers to it. See *Oliphant* against ——, *December*, 1677, No. 678.

And it having been alleged, that thir annuals behoved to be confirmed, the Lords found no necessity thereof, since they were due after Peironon's death, and so belonged to her *nomine proprio*, and not *executorio*; and could not be in Peironon's goods, they not being then due when he deceased.

Advocates' MS. No. 673, *folio* 311.

1677. *December* 11. WILLIAM LOCKHART *against* JOHN LOCKHART, Legatee.

THE Lords, after advising the probation, reduced the disposition granted by John Lockhart, as done *in lecto*, and in prejudice of William, his brother and heir; for though he went to kirk and market, yet it was supported; and repelled their decreet of declarator, finding that he granted that disposition *in liege poustie*, because the witnesses were not then examined upon this interrogatory, Whether he went supported, yea or not. *Vide supra*, in *December*, 1672, *Boyd* and *Cleilland of Faskein*, No. 379.; *item*, *Balmerino* and *Couper*, in *February*, 1670.

John Lockhart had disponed much of his estate to outed ministers, and other pious uses, which all fell by his reduction. William was at this time lurking, in regard of the error he had committed with Dalhousie's sister, and yet refused to marry her. *Advocates' MS. No.* 677. *folio* 311.

1677. *December*. OLIPHANT of Gask *against* ——————.

IN a case of Oliphant of Gask's, there is an old bond bearing annualrent. The same is transacted; and in satisfaction thereof, and in obedience to a decreet-arbitral, a new bond is given, but contains no obligement for paying of annual; yet it is acclaimed, because the old bond bore it, *et surrogatum sapit naturam ejus in cujus locum subrogatur*. (See Stair's Decisions, 30th July, 1661, *Brown* and *Carleton*; and Dury, 15th July, 1631, *Forbes*.) The Lords found annualrent due; which some thought strange. Dury, in his Practiques, observes sundry cases where annual is due, though there be no paction for it. It is due, *ex lege*, after horning; 2*do*, To a cautioner; 3*tio*, If the price of land; 4*to*, Upon bills of exchange; 5*to*, Upon use of payment; 6*to*, If one term be mentioned in the bond, though no more; 7*mo*, To brokers in Bordeaux. *Vide* No. 673, *Pyronon* against *Morison*, 8th December, 1677; as, also, see other observes anent this point beside me.

Advocates' MS. No. 678, *folio* 311.

1677. *December* 13.—A DECREET, obtained by James Sinclair of Roslin against Major Winrahame, was turned to a libel; because the decreet was collusively pronounced: and it was acknowledged, the Major was then at London, and the decreet was given in absence. *Advocates' MS. No.* 680, *folio* 312.

1677. *December.*—A NAKED appriser not infeft, some think, has interest to propone improbation of a disposition of the apprised lands, whereupon infeftment has actually followed. *Vide infra*, [No. 720, 2d February, 1678,] *Cochrane of Ruchsolls* against *Cathcart*. *Advocates' MS. No.* 681, *folio* 312.

1677. *December.*—THE town of Edinburgh using quartering upon the deficients in the excise of the ale brewed, Mr George Campbell, and some other brewers at the Yard-heads of Leith, presented a bill of suspension; alleging, by the act of Parliament, 1661, anent the excise, they have no power to quarter, but only to use such like execution as they have against them who pay their common-good, viz. imprisoning. The Lords waved to decide it, and advised the town of Edinburgh to agree. *Advocates' MS. No.* 682. *folio* 312.

1677. *December.* The TOWN OF EDINBURGH *against* The TOWN OF ABERDENE, &c.

THE town of Edinburgh having charged, by George Blair, their factor, both the towne of Aberdene, and the fishers at Glasgow and Greenock, upon their gift from the King of marking and jadging all their barrels. Alleged against, 1*mo*, They want a decreet conform. 2*do*, It is prescribed, and in desuetude; and Edinburgh never attained possession by virtue of it. 3*tio*, The Royal Fishing Company exacts the same duties from them, and they cannot pay to both. 4*to*, for Aberdene alleged, By the 141st act, Parliament 1584, they have a right to it themselves; and it is contained in all their infeftments since. See the answers to thir, both in the information against the magistrates of Aberdene, and in the information against the fishers in Greinock, &c. *Advocates' MS. No.* 683, *folio* 312.

1677. *December* 13.—IN an advocation, presented by James Lockhart of Cleghorne, of an action pursued before the Bailies of Edinburgh by Alexander Young, merchant there, against Patrick Vausse, keeper of the tolbooth of Edinburgh, for giving up 100 merks, consigned by the said James for getting one Vernor liberated, it came to be debated, since Vernor was incarcerated only on a warding, whether such prisoners may be liberated without a formal charge to set at liberty, since the act of sederunt dated the day of , 1675, provides, where any are incarcerated by captions, it shall not be lawful to set them at liberty without such a charge; and if there be any *ratio disparitatis* between them. See the information of it beside me. *Advocates' MS. No.* 684, *folio* 312.

1677. *December* 13.—IN a suspension, Monteath against Jean Stitts, ALLEGED, No process; because the charger was out of the country, and no procuratory pro-

duced from her. Answered, 1*mo*, A dilator not verified; 2*do*, If needful, before extract, a mandate should be produced.—Repelled the dilator. Here it was a fine for a contumely and verbal injury; and it was debated, if *veritas convitii excusat a calumnia*, and if it was relevant to offer to prove it, since *non intererat rei publicæ* to be discovered. But this is argued fully *supra*, in July, 1673, [No. 414,] *Fork* against *Fyffe*. *Advocates' MS. No.* 685, *folio* 312.

1677. *December* 14. JOHN DAES *against* Mr JAMES DAES, his Brother.

MR JOHN DAES having charged Mr James Daes, advocate, his brother, upon his bond of provision for 6000 merks, Mr James raised suspension and reduction on this reason, that he granted the said bond, as its narrative proved, *intuitu*, and in contemplation of a disposition their father had given him of his heritable and moveable estate, reserving his own liferent; and yet Mr John, the charger, had got the most of these moveables disponed to Mr James: and so he behoved to have retention of this bond of provision, *condictione, ob causam datorum causa non secuta*, there being a συναλλαγμα, and a mutual obligation, where the one was the *causa finalis* of the other, and he could not perform unless he had got wherewith. ANSWERED, *Condictio causa dati* was mistaken: since he was not the person who had disponed the heritable and moveable estate to Mr James, his want thereof could not compense Mr John's portion, that being *inter diversas personas*. Yet the Lords found Mr John Daes, the charger, could not have both the sums contained in the bond, and also the moveables; but if he take himself to the bond, the disposition of the moveables must be imputed in part of the bond, in regard the bond is given in satisfaction of his portion natural.

Then ALLEGED for the charger,—That none of the moveables he had got could be ascribed to deduce off any part of his bond; because it was offered to be proven, that they were none of those moveables disponed to Mr James, which was a part of the onerous cause of the granting the bond of provision charged on; but were a part of the father's reserved liferent, and of the moveables he had acquired since June 1669, which, by a contract passed betwixt the father and Mr James, he permitted his father to dispose upon at his pleasure; and so might give them to his second son, Mr John, as well as to a stranger. This was sustained as relevant.

Then ALLEGED for Mr James, the suspender,—That even thir moveables behoved to be affectable for the father's debt, notwithstanding of his gratuitous disposition thereof to his son, after the contracting these debts. ANSWERED, He could not be heard; because, by an agreement betwixt his father and him, he had undertaken all the debts. REPLIED, It was only conform to an inventory; and he had been necessitated to pay debts not contained therein. DUPLIED, By a writ under his hand, he had undertaken to relieve his father of all debts. This duply, on the 13th of February, 1678, was found relevant; and, before answer to the rest, we were ordained to produce the haill writs founded on. See the informations and bills in this cause beside me. *Advocates' MS. No.* 686, *folio* 312.

[See the subsequent part of the Report of this Case, Dictionary, p. 14848.]

1677. *February, June, July, and December.* ALEXANDER ARBUTHNOT of KNOX, *against* STRAITON of LAURESTON, and COLONEL HARY BARCLAY.

February.—About this time, Alexander Arbuthnot, brother to the Lord Arbuthnot, competing at Exchequer for the gift of recognition of the lands of Knox, disponed to him by Colonel Hary Barclay, his father-in-law, in his contract of marriage with the said Colonel's only daughter, with Straiton of Laureston, who craved it as having right from the said Colonel and his lady, (who was Laureston's sister:)

The Lords preferred Alexander Arbuthnot. See the information of it beside me; as also anent the gift of escheat, the removing, and the many other actions betwixt the said Colonel Hary and Alexander Arbuthnot, his son-in-law; as also, their defending against the Earl of Marshall's improbation. *Item*, if the gift would be sufficient without mentioning the specific cause whereon it was incurred. See it resolved, *supra*, November 1671, No. 238.

Advocates' MS. No. 550, § 3, folio 277.

June 14.—In Alexander Arbuthnot of Knox his cause, against Colonel Hary Barclay, (which *vide supra, numero* 550, § 3,) it was resolved by Sir George Lockhart, and so found, that a naked resignation, (whereon no infeftment is yet taken or expede,) either in the King's hands or any other superior's, does not so state the right of the superiority in the person of that superior, in whose hands it is resigned, as to give him the right of the casualties, liferent-escheat, &c.; but if he held base of the granter, and thereon infeft, the said annailyier would have right to these intermediate casualties, which are solely produced by an infeftment, and not by a charter without seasine, much less by a resignation. See Dury, *23d March* 1630, *Hay of Tourelands* against *Auchnames*. *Vide infra*, [No. 652, *November* 13, 1677,] Strachan of *Kinnaldy*.

Advocates' MS. No. 571, folio 284.

July 26.—Alexander Arbuthnot of Knox having, as donatar to the liferent-escheat of Colonel Henry Barclay, obtained decreet of removing, and special declarator for maills and duties against the said Colonel Henry, and his tenants of Knox and Tullos, before the sheriff of Kincarden;—the Colonel suspends on thir reasons, 1*mo*, That the said Alexander, though donatar, yet not being a creditor, had no interest, his back-bond being satisfied; and the Colonel had obtained, at the Exchequer, a second gift of his own escheat. 2*do*, As for the debts that either Alexander, the charger, or his brother, the Viscount of Arbuthnot, had paid for him, they promised, at the time of Alexander's marriage with the Colonel's daughter, they should never charge him with them, because they had got the fee of his estate.

ANSWERED, to the first,—We opponed the back-bond which declared the Colonel's escheat was gifted to Alexander for securing him in the right of the lands, which was not yet done, &c. and scarce one point of the back-bond was fulfilled; likeas, he had not given in a revocation of the right *stante matrimonio* granted by him to his lady. As to the second, We found it relevant that Alexander promised *scripto vel juramento*.

They craved the Viscount might also depone if he promised; which Gosford sustained. Whereupon, both deponing *negative*, the letters were found orderly proceeded, both in the removing and maills and duties. And, in the re-

moving, the sheriff having been charged on 15 days to do his office, and refusing, letters of ejection were got forth; which at last he obeyed.

On the 1st of August, 1677, Alexander Arbuthnot obtained past at Exchequer a signature of resignation and confirmation of his base infeftment in the lands of Tullois; and Straiton of Laureston seeking, at the same time, a confirmation of the base right of the lands of Knox, granted by Colonel Henry to Margaret Straiton, his lady, and sister to the said Laureston;—it was waved, in regard double confirmations are forbidden by law, viz. the 66th Act of the Parliament in 1578; and double dispositions are declared stellionate, by the 102d Act, Parliament 1540. *Vide supra* in *February* 1677, No. 550, § 3, and in *June* last, *numero* 571. See the large informations upon all thir affairs of Knox and Colonel Hary Barclay, beside me.

Advocates' MS. No. 622, folio 296.

December 14.—Alexander Arbuthnot of Knox pursues a declarator of recognition of the lands of Knox, as donatar, against Colonel Hary Barclay and Margaret Straiton, his spouse. *Primo*, It was DENIED the lands held ward. ANSWERED,—1*mo*, Ward is presumed, unless another holding be instructed. 2*do*, We produced Colonel Hary's own charter bearing ward. This allegeance was repelled.

Then they ALLEGED,—That the disposition whereupon the alienation and recognition was alleged to have been incurred, was not absolute but conditional to his wife, failyieing of children procreated betwixt them; so that the fee and property were not immediately transmitted and devolved, but suspended during the dependance of that condition; and such an alienation neither imported contempt nor recognition.

ANSWERED,—This downright choked the principles of the feudal law, by which such rights, under conditions, did not salve the forefaulture; as was evident from Craig, *Feud.* p. 344, and from Stairs, in his System, *titulo* Of Extinction of Fees, p. 375. And this allegeance was already repelled in the case of *Cranburne* and *Carnegie*. See Craigie's Collection, *verbo* Recognition, *folio* 134.

The Lords fearing that, if this recognition were declared, the donatar would sweep the relict (for Colonel Harry died during the dependance,) quite out of her jointure; they first prevailed with him to give a declaration, that this recognition should not prejudge the provision settled on her by her contract matrimonial; after which, the Lords found recognition was incurred by that disposition, though conditional.

The relict's procurators dealt likewise to have what her husband had provided her to *stante matrimonio*, secured and reserved to her; but that was refused. See the information in this cause.

Advocates' MS. No. 687, folio 312.

See the remaining parts of the report of this case, Dictionary, pages 13,160, 13,889, 6,761; *et infra*, 15, December 1680.

1677. *December* 15. DAUGHTERS of SIR THOMAS NICOLSONE and their Husbands *against* SIR JOHN NICOLSONE.

THE cause between Sir John Nicolsone and the Daughters of Sir Thomas Nicolsone of the first marriage, and Eleis of Southsyde, Scot of Malleny, &c. their Husbands, came to be decided: wherein Sir John was found liable to them

in £20,000 Scots, as heir of tailyie of Colbrandspath. See the case and decision *alibi*. *Advocates' MS. No.* 688, *folio* 318.

1677. *December.* ANENT EXECUTORS.

IT was inquired if an oath, given by an executor upon the inventory of the testament, where he has either omitted things knowingly and fradulently, or given them up on oath to a notorious less value, will infer perjury, seeing this would involve many in Scotland. *Advocates' MS. No.* 689, *folio* 313.

1677. *December* 15. MR JAMES LAUDER *against* ONE of the TENANTS of BERFOOT.

MR James Lauder, as factor constituted by the Lords of Session to uplift the rents of Berfoot for the behoof of the lady's creditors, having charged one of the tenants upon a decreet in absence; he suspended, ALLEGING,—By a tack, he was only liable in such a duty.

ANSWERED,—That tack was only set to him by collusion, by David Boyd, seeking to intrude himself in possession; and it being with diminution of the former rent, and he only one creditor, he could not prejudge the rest.

Glendoick repelled the reason, in respect of the answer, and found the letters orderly proceeded against the said tenants, called Storie and Bairnsfather, for the old duty. *Advocates' MS. No.* 690, *folio* 313.

1677. *December* 15. MR THOMAS GORDON *against* JOHN STRAITON.

JOHN Straiton is pursued for a horse stolen out of the park, at the instance of Mr Thomas Gordon, the writer, as the owner.

ALLEGED,—He must be assoilyied, unless some *culpa* be qualified against him.

ANSWERED,—He was *in culpa*, because there was a slop made in the park-dike, out at which horses might be taken away easily.

REPLIED,—*Non relevat* to make him liable; because, 1*mo*, He intimated to them, after that slop was made, that their horses should thereafter be on the inputter's peril. See the title *D. Nautæ, Caupones, Stabularii*, and the lawyers there. 2*do*, That slop was not made by him, but by public authority, for carrying stones to the abbey, which he might not resist. 3*tio*, He did all *quod in se erat*, for he set a guard at that slop.

DUPLIED,—Intimation *non relevat*, since *res non erat integra*; and it was *intempestiva*. 2*do*, The supervenient authority is nothing to the inputters. 3*tio*, Offers to prove they came and took instruments there were none watching at the slop.

TRIPLIED,—All he was obliged to do, was to set men there; he could not

attend always himself. *Qdo*, They might be near by, or at the back of the dike.

John Straiton seems to say much for his own liberation. See Dury, *28th November* 1626, *a Stabler* against *Mowat*, and Bartolus and Mascardus, there cited. See *16th July* 1679, *Binny* and *De Veaux*.

The Lords, upon a report, inclined to find John Straiton not liable, in respect of his *placeat*, unless they would qualify *dolus* or *culpa* on his part. And that thir denunciations are legal, see *L. ultimam in principio, D. nautæ, caupones, stabularii.* See Nicolaus Mozzius *de Contractibus, tit. Societas, p. 554*; Masuerii *Practica Forensis, titulo De Probationibus, p. 137, in calce.* See Mr Alexander Birnie's case. *Advocates' MS. No. 691, folio 313.*

1677. *December* 15. DOCTOR BONNER *against* SIR PATRICK THREIPLAND.

DOCTOR Bonner pursues Sir Patrick Threipland, late provost of St Johnston, *pro salario*, as having attended him, when he or some of his family were sick. ALLEGED,—He denied the order or employment. ANSWERED,—He produced a letter, written by Sir Patrick to him, desiring him to come, &c. REPLIED,—That will serve for that sickness, but will not be a universal constitution of him to be his physician in subsequent sicknesses; to which he came officiously uncalled, and only to make a visit, and dined.

The Lords sustained the first employment sufficient, unless countermanded; and modified ten dollars for every visit, it being four miles distance.

Advocates' MS. No. 692, folio 313.

1677. *December.* ANENT ADJUDICATION.

WHERE one obtains a decreet against his debtor's heirs, as lawfully charged to enter heir in general, and they do not compear nor renounce to be heir; before one can adjudge on the new Act of Parliament, 1672, it will be safest to raise a special charge to enter heir, and execute it, before they raise the summons of adjudication, though that Act of Parliament mentions it not. Likeas, though the said Act mentions not the calling of the superiors, in thir summonses of adjudications, yet it will not be amiss to call them, as is done in the adjudications upon the apparent heir's renunciation. *Advocates' MS. No. 693, folio 313.*

1677. *December* 18. KINROSSE *against* CLEILLAND, Merchant.

IN the action, Kinrosse against James Cleilland, merchant, one comes to Cleilland to take off clothes and other ware: he tells he must have a cautioner: he brings one, who declares, if what was taken off was within 200 merks, he was content to engage to see the merchant paid; if otherwise, then he would not

engage: there is more taken off than 200 merks; the cautioner is pursued. He ALLEGES *absolvitor;* because he had trusted him far above 200 merks; and his being cautioner for him was only conditional; and, the condition not observed, he was altogether free. ANSWERED,—*Utile per inutile non vitiatur;* he was not craving him to be liable *quoad excessum*, but only *ad concurrentem quantitatem.* REPLIED,—*Stipulatio* was *individua;* and, not being then accepted, it was *in totum inutilis*: § 5, *Institut. de inutilibus Stipulationibus.* DUPLIED,—Vinnius there confesses that was but a subtle nicety, and contrary to *Lex* 83, § 3, *D. de Obligationibus.*

The Lords found (*referente* D. Pitmedden,) the cautioner was obliged for 200 merks, and presumed the merchant's acceptation of it at that time by his present declaration of his mind now, (because of the exuberance of faith *in re mercatoria*). Yet see *Lex 52 D. Locati*, cited by Vinnius, *ubi supra*, who distinguishes *inter contractus onerosos et lucrativos:* but I see not the reason of it.

Advocates' MS. No. 694, *folio* 313.

1677. *December* 20. JAMES BAYNE *against* HALL.

JAMES Bayne, the wright, having undertaken the rebuilding of one of those burnt tenements near the Netherboll, upon this condition, That he should possess it aye and while he were reimbursed; he summarily pursues the relict, called Hall, to give him the keys, though she stood infeft in the ground of the tenement, *viz.* before it was burnt.

The Lords found she was not bound to remove summarily; but behoved to be warned, though the superficies was extinct. See this case more fully deduced in another law manuscript. *Advocates' MS. No.* 695, *folio* 313.

1677. *December* 20. ROBERT BRUCE *against* ANNA DOUGLAS, Relict of Sibbald of Kair.

IN the action pursued by Robert Bruce against Anna Douglas, relict of Sibbald of Kair, where he pursues, as executor-dative *ad omissa*, her as executor-principal, as intromitting with the goods omitted by her and confirmed by him: she cannot object against the grounds of the debt, but must do it by way of reduction of the decreet-dative, unless the executor be confirmed *qua* creditor; and then they have interest to object, why their super-intromission cannot be questioned, unless, you will say, they are more than paid. Yet they are vitious intromitters, even as to that superplus, for they want a title; since they should have eiked it to the principal testament, and not have suffered another to have taken a dative *ad omissa.*

In this cause there was occasion to propone, on the Act of Parliament in 1670, that the bond was prescribed *quoad modum probandi*, being holograph; *item*, on the axiom *quod debitor non præsumitur donare.* See the informations.

Advocates' MS. No. 696, *folio* 313.

1677. *December* 20. MR ALEXANDER MORTIMER *against* ISOBEL GLENDONING.

MR ALEXANDER Mortimer, late minister at Kirkcubright, pursuing Isobel Glendoning: she defended, on a decreet of exoneration, finding the inventory of the testament exhausted, to which the pursuer himself was called. He REPLED on super-intromission. DUPLIED,—*Non competit hoc loco:* let him take a dative, and then he shall get an answer.

Yet it seems, where fraudulent super-intromission is offered to be proven against an executor, and by their own oath, it may, in such a case, be receivable without a dative; but in other cases they ought to take a dative.

Advocates' MS. No. 697, *folio* 313.

1677. *December* 20. The VISCOUNT of OXENFUIRD *against* MR JOHN COCKBURNE.

IN the pursuit, at the Viscount of Oxenfuird's instance, against Mr John Cockburne, he convenes him as he who was either as tutor, pro-tutor, factor, negotiator, governor, or who had the trust of his monies, in his minority, and while he was travelling abroad; that he may make count, reckoning, and payment to him for what monies were remitted to him by his friends, laying aside once what might handsomely maintain him. And he founded on the trust contained in the *actiones excercitoriæ institoriæ;* and in the edict, *nautæ, caupones,* &c.; and that young men be not not tempted to spend prodigally, which is the *ratio senatus-consulti Macedoniani.*

ALLEGED,—There was no title or jot in law on which he could be overtaken, he having only the trust of my Lord's person and breeding.

The Lords found Mr John Cockburne liable to count for all the bills remitted to his Lordship while abroad, and actually intromitted with by him; as also with what rents he lifted at home: reserving to themselves to consider, at the conclusion of the cause, how much his being governor should operate.

Some of the Lords were of opinion to have made him liable *simpliciter;* but the plurality qualified it, so as to render him only countable for his actual intromissions. However, the decision was in a new and extraordinary case; and it was not imaginable that, in their travels through France, Italy, Germany, and other places, Mr John, as my Lord's governor, either had kept an exact count-book, how he disbursed my Lord's money, or took any receipts of what he paid at Innes's, [Inns,] or other places.

Advocates' MS. No. 698, *folio* 314.

1678. *January* 1. HARPERFIELD *against* BALLANTYNE of CORHOUSE.

IN an action at the instance of Harperfield against Ballantyne of Corhouse, the Lords found a decreet of adjudication may be pronounced summarily, without enrolling. And the offering to prove the debts, for which the adjudication

is led, are paid, ought not to stop the course of the diligence, unless it be instantly verified, although it be an adjudication in the new form, reserving all the defences to the action for maills and duties. *Vide supra, 2d December* 1675, *Kello* and *Nasmith, No.* 453, § 3.

Referring to oath, if the pursuer be in town, will be reputed an instant verification. *Advocates' MS. No.* 700, *folio* 314.

1678. *January.* JAMES DEANS *against* SIR ADAM BLAIR.

JAMES Deans, bailie in the Canongate, charges Sir Adam Blair of Carberry for £900 contained in his bond. Sir Adam craves compensation for some coals furnished by him to the charger, and refers it to his oath. He not being clear on the quantity, defers it back to Sir Adam. He scruples likewise. Craigie, Justice-Clerk, ordains the coal-grieves and inlayers of the coals to be examined anent the quantities.

Against this, ALLEGED,—They could not take away a liquid written bond. REPLIED,—James Deans his oath had loosed and taken it away this far,—That he had declared he had gotten some coals in part of payment. The Lords sustained the quantities inlaid to be proven by the witnesses foresaid.

But the term being circumduced against them, for not compearing to depone, James Deans, charger, declared he was now clear, after trial, to depone on the number of the loads furnished.

Then Sir A. Blair obtained a declaration from the Lords of the Treasury, that since this bond was contracted on that account, therefore recommended to the Lords to supersede any execution on it till Sir Adam had closed his accounts in Exchequer.

Against this it was OBJECTED,—That it was *rescriptum subrepticium et obrepticium, celata veritate et expresso, mendacio, contra jus et utilitatem publicam;* and therefore the Emperors themselves command it *ab omnibus suis judicibus refutari.* And our Acts of Parliament condemn all privy writings, contrary to the furtherance of justice. Act 47, Parliament 1587, and the laws there cited from the Codex.

This process sisted by James Deans his death.

Advocates' MS. No. 701, *folio* 314.

1678. *January* 1. GEORGE GRAHAME, MALLOCH, *and* WEDDALE.

UPON a report *in præsentia*, in a case of George Grahame, Malloch, and Weddale, John Frazer was simply repelled from bearing witness in any cause, because of this objection,—That he was convicted of bigamy, and so, by Act of Parliament, is infamous, though he had a remission therefore: but here there was no *penuria testium.*

It seems strange, in our law, that adultery shall be death, and bigamy only punished with an inferior arbitrary pain. *Infra,* [*28th May* 1678, Historical Volume,] *Bruchton's case.* *Advocates' MS. No.* 702, *folio* 314.

1678. *January.* ANENT DONATARS to ESCHEATS.

A DONATAR to an escheat having given a back-bond and entered into possession, is pursued by second donatars, to count and reckon, as being paid by intromission; at least might have intromitted with as much: the question is, if he can be countable for ought and should have intromitted, as a first appriser is to a second.

It seems reasonable he condescend upon some obstacle and impediment that hindered him from possessing; for the gift above his own payment is but a trust,—it is *mandatum partim causa mandatarii, partim causa alterius*, viz. of the other creditors, &c. See Dury, *15th December* 1626, *Donatar to the Laird of Foulls* his escheat. *Advocates' MS. No.* 703, *folio* 314.

1678. *January* 11. RELICT of JOHN INGLIS of ELVINGSTON *against* MR JAMES ELEIS of STANHOPMILNES.

IN a competition between the Relict of John Inglis of Elvingston and Mr James Eleis of Stanhopmilnes, for the gift of the said Elvingston's escheat, the Lords of Exchequer preferred the said Relict to the gift, *qua* creditrix on her contract of marriage; notwithstanding Stanhopmilnes sought it on his own horning, and was the first discoverer of the casualty to the King's Exchequer; because he seemed to be sufficiently secured for his debt *aliunde*, by an infeftment; and he did not offer to renounce his infeftment.

Advocates' MS. No. 705, *folio* 315.

1678. *January* 11. ANENT CASTLE-WARDS.

AT Exchequer, Sir John Nisbet was found liable in £4 Scots yearly, as the castle-ward-duty payable for the Castle of Dirleton, and contained in the Chekker rolls. There were only six shires towards the south, and bordering on England, that had these castle-wards.

Dirleton ALLEGED,—These lands, by Gowrie's forfaulture, being annexed to the King's crown, and thereafter given out to the Earl of Kelly free, and without mention of any such duty, it was thereby discharged. Which defence the Lords repelled. *Advocates' MS. No.* 706, *folio* 315.

1678. *January* 12. The TOWN of HAMILTON *against* ROBERT HENDERSONE.

IN the mutual reductions and declarator between the Town of Hamilton and Robert Hendersone,

1*mo*, Offered to prove, by the writer's witnesses and trysters, that the sum was blank at the subscribing; which being granted, then by the parties in

whose hands the writs were depositate and consigned, that they were not to be filled up nor delivered, till a count had preceded between them.

ANSWERED 1*mo*,—His bond cannot be taken away but only *scripto vel juramento*. 2*do*, He will yet instruct he was either debtor to him, or bound to relieve him, for as much as the sum filled up in the bond; and that before the filling up of it.

REPLIED,—These debts must be before the inhibition served against the common debtor, by the Town of Hamilton, else they cannot be allowed.

DUPLIED,—The inhibition is null; because it does not bear a publication at the market-cross where he then staid, *viz.* Rutherglen, within which prison he then was. See Lanfrancus Balbus, *Decisione* 494.

TRIPLIED,—They needed not but at the place where he had *domicilium*, (for in prison he had it not, that being *mala mansio et involuntaria*,) *viz.* at Hamilton, where his wife and bairns dwelt, the inhibition was published.

Newton found it a sufficient publication that was made at the market-cross of the principal burgh of the shire or regality where he had *focum et larem*; the inhibiter proving always, that Nasmith, before he was carried prisoner to Paisley, had his ordinary residence within the regality of Hamilton. And as to the first, ordained Hendersone (for though, *pendente lite*, it was assigned to and it judicially produced, and the rest of the acts of the process carried on in the assignee's name, yet it was declared that assignation should not prejudge us of any defence competent against the cedent, nor of his oath,) to depone if the bond was blank and depositate; and, in case he confess this, then ordains the depositary, witnesses, and fillers up of the sum of the bond, to be examined upon the conditions. See the information of it.

The Lords allowed Hendersone (since the sum was proven to have been filled up without the debtor's knowledge,) yet to instruct the onerous cause, and that Nasmith was his debtor in as much as his half of the bond came to.

Advocates' MS. No. 707, *folio* 315.

1678. *January.* DUNDAS *against* HOLBORN of MENSTRIES.

IN a case of one Dundas against Holborn of Menstries, about some levy-money in 1649; the Lords found, in so old a debt, they behoved to libel resting owing unpaid; because it is presumed such money was presently expended. *Vide supra, July* 1669, *Bonar* against *Cleilland.*

Advocates' MS. No. 709, § 1, *folio* 316.

1678. *January.* ANENT EXECUTORS and TUTORS.

AN executor or a tutor assigning bonds of the defunct's or minor's, no execution ought to be granted thereon, till the cedents clear their counts, that they are creditors, or have a right; for they may be found paid by their intromission.

Advocates' MS. No. 709, § 2, *folio* 316.

1678. *January.* TOWN of ABIRDENE *against* some of their BURGESSES.

IN the case of the Town of Abirdene with some of their Burgesses, it was queried if towns had power to stent, since that seemed only to be the power of King and Parliament. Yet the Lords found they had, both in regard of their possession and use to do it, and that there were some acts about it. *Vide supra, December* 1672, No. 381, *Town of Invernesse* and *Forbes of Culloden.* See *20th November* 1678, *Wishaw* and *Lundie.*

Advocates' MS. No. 709, § 3, *folio* 316.

1678. *January.* ANENT PROVISIONS in lieu of TERCE.

A WOMAN, in her contract of marriage, accepts a jointure in satisfaction of terce and third, or any thing she could crave. She dying before her husband, *quæritur* if that generality of the clause will exclude her executors from the *communio bonorum*; for it seems only to provide *in unicum istum casum* that she survive the husband. Lawyers differ on it. This clause uses to be conceived more amply now, whereby she is made to accept the liferent provision, in satisfaction of terce, third, or all other part, either of moveables or heritage due by the law or custom, which either she could crave by her husband's predeceasing, or that her executors could crave, if she happen to decease before her husband. *Advocates' MS. No.* 709, § 4, *folio* 316.

1678. *January.* ANENT SUCCESSION in BONDS.

A MAN takes a bond, payable to himself and his heirs, secluding his executors. *Quæritur*, if this will fall to the heir of line or heir of conquest. See Stair's System, *titulo* Succession.

Advocates' MS. No. 709, § 5, *folio* 316.

1678. *January.* KINLOCH *against* KINLOCH.

THERE is a first contract of marriage, providing a sum to the heirs or bairns of the marriage: there were procreated of that marriage a son and a daughter. The Lords found both the son and the daughter might be served heirs of provision of the marriage; which was thought strange. The parties were *Kinlock* against *Kinloch.* It was made a query to the Lords. Sir George Lockhart was of opinion that the legal way was to serve the son, or if there had been more sons, the eldest heir in the whole; and he, then, would have been liable, *actione personali*, to the rest, for their equal shares and proportions; though, it may be, it was not the meaning nor intention of the parties contractors that they should succeed all alike, or be all of them at the expense of serving heirs. Yet there

were two decisions conform to this before, *viz.* 17th *February* 1663, *Hay* against *Morison;* and 10*th July* 1677, *Carnegie and Smith* and *Mr Thomas Baird.* *Advocates' MS. No.* 709, § 6, *folio* 316.

1678. *January* 17. SIBBALD of KAIR *against* FALCONER of GLENFARQUHAR and GUTHRIES.

IN an exhibition pursued by Sibbald of Kair against Falconer of Glenfarquhar, and Guthries, of some writs; in regard the defenders Guthries were not personally apprehended on the second summons, therefore the Lords found their procurator was not obliged to take a day to produce them, to depone anent the having of the papers called for, since they could not be holden as confessed; albeit it was alleged, that they lurked and kept themselves out of the way of purpose, or for fear of caption. *Advocates' MS. No.* 710, *folio* 316.

1678. *January* 18. JAMES DEANS *against* SIR WILLIAM PURVES.

THERE was a competition between James Deans, in the Canogate, and Sir William Purves, solicitor, anent the right to a sixteenth part of a ship which belonged to Francis Aird. Sir William claimed right, as donatar to Francis Aird's single and liferent escheat, and whereon he had obtained a decreet of general declarator. James Deans his right was an assignation from Francis, and intimated; who alleged Sir William's decreet was in absence and null; because every such declarator has two conclusions: one that the party was rebel, and orderly denounced; the *second*, that the pursuer was donatar to that casualty of rebellion. Now, though this second was proven in his decreet, by production of his gift mentioned therein, yet he had produced no hornings therein, though the gift narrated three; and so the decreet was intrinsically null, for lack of probation of the first point.

ANSWERED 1*mo*,—It was but *vitium transcriptoris;* he would mend it, and abide at it; for the hornings were as truly then produced as his gift was. But, 2*do*, *Esto* he had no declarator, he must be preferred to James Deans, because the common author, Aird, was denounced before the making of that assignation; and so, there being a *jus quæsitum* to the fisk, he could do no act in prejudice thereof.

REPLIED,—We must first see the hornings, to object against them; for they may have nullities and informalities. Newton ordained us to see the hornings.

2*do*, REPLIED,—That James Deans his assignation and intimation being before Sir William's gift of escheat and declarator, though it be posterior to the denunciation itself, it must be preferred; as was found in Dury, 20*th November* 1623, *Hamilton.*

DUPLIED,—The assignation in that practick was not altogether voluntary, but in obedience to a caption. 2*do*, The Lords have clearly decided since this case, and preferred the donatar wherever the assignation is after the denunciation; and particularly in the case of *William Veitch* and *Peter Pallat:* where

that practick of Dury's was urged, and repelled. See *supra*, No. 422, *in November* 1673; *item, supra, No.* 156, *Helen Hamilton* against *Bell*, &c. *25th February* 1671. See the information of this case against Sir *William Purves* largely. The Lords, upon Newton's report, preferred Sir William donatar to the assignee.

Then offered to prove, by Sir William's oath, that he promised to communicate the benefit of this gift, (at the time he took,) for the common relief of himself and the said James Deans, wherein they stood cautioners for Francis Aird in the first place. This Sir William denied on oath. James may get a second gift burdened with Sir William's backbond. We also ALLEGED against the one horning,—That it was posterior to our assignation. This horning they passed from. Against the second horning we objected, it was for relief and no distress. Offered to instruct distress. Against the third, That Aird dwelt within the Canongate, which is a part of the regality of Broughton, and yet not denounced at the Canongate cross. ANSWERED, 1*mo*, He dwelt in the house at the back of the Abbey, which is within the shire; 2*do*, It was not receivable *hoc loco*. It was repelled, because *in facto* and not verified, reserving our reduction on that head as accords, since the Officers of State were concerned. *Vide supra*, 11*th November* 1673, *Mr Patrick Home*, [No. 423.]

Advocates' MS. No. 711, *folio* 316.

1676, 1677, *and* 1678. WILLIAM HAY of DRUMALZIAR *against* JOHN, EARL of TWEDALE, his Brother.

1676. *July*.—WILLIAM Hay of Drumalziar pursues John, Earl of Twedale, his consanguinean brother, to warrant to him some lands, as heir-general, whereon had followed distress and eviction; *item*, to relieve him of sundry debts, and to purge incumbrances, which he condescended on as lying on his lands.

ALLEGED,—He had no title, not being served heir of the second marriage. ANSWERED,—He would do that *cum processu*. REPLIED,—His active title behoved to be established before he raised his process, else it was *filius ante patrem*. *Vide supra, February* 1674, *Duke* and *Duchess of Hamilton* against *Mr Gavin Loudon*, No. 441.

The Lords found he might serve *cum processu*, though it was a part of his active title. *Advocates' MS. No.* 490, *folio* 257.

1677. *February* 28.—In William Hay of Drumalzier's action against his brother, the Earl of Twedale;—the Lords sustained Twedale's defence of having alimented him, &c. *Advocates' MS. No.* 550, § 1, *folio* 277.

1677. *July* 19.—This day, Drumailziar and his brother the Earl of Twedale's cause, was debated anent the Earl's relieving him of the debts, he being bound to warrant Drumailziar's infeftment.

ANSWERED, 1*mo*, There is no distress; and it is a lewd wantonness and caprice to crave relief before distress, by which anticipation he hounds out other creditors on my Lord. 2*do*, Drumailziar, for making up his title in this pur-

suit, being served heir of provision to the father, *(vide supra, num.* 490 *and* 550,*)* he cannot pursue, because the obligation is extinct and confounded. And there was no rational or legal way of securing the provision he got from his father, from his father's posterior debts, but by serving an inhibition against the father upon that obligement, though the remedy be a little harsh.

On the 27th of July 1677, both parties having submitted one point of £1000 sterling, in variance betwixt them, to the President, he arbitrated 16,000 merks with consent of both parties; and, having reported it to the Lords, he obtained their authority interposed thereto. *Advocates' MS. No.* 609, *folio* 294.

1678. *January* 22.—This day Hay of Drumalziar's action against the Earl of Twedale his brother, was advised, and the Lords modified the price of the lands to 16 years; and thereafter, on a bill given in by Drumalziar, they raised it a year's purchase more, *viz.* to 17, which was thought a very competent price for lands in Twedale. See this more fully observed *alibi*.

Advocates' MS. No. 712, *folio* 316.

1678. *January* 25 *and* 26. The Duke of Lauderdale *against* The Earl of Twedale.

Thir two days were wholly consumed almost in the Inner-House (yea, they sat till one o'clock, which some affirmed unlawful,) in advising the Duke of Lauderdale's action against the Earl of Twedale, about the teinds of Pinky, within the lordship and regality of Mussleburgh, in which there were three points; one of the tack, another of the heritable disposition, and if it was annexed property, and the third was, if it was prescribed, since, in the English usurpation, the Duke of Lauderdale was *nec valens, nec volens, nec potens agere*. Of this see more *alibi* in thir collections. *Advocates' MS. No.* 714, *folio* 316.

1678. *January* 29. John Lamb *against* The Earl of Carnwath.

In the action pursued by John Lamb, merchant in Edinburgh, against the Earl of Carnwath, on the passive titles, for payment of the sum of contained in a decreet *in anno* 1668, obtained by Lamb's cedent against his father:

Alleged,—The decreet was for a remain of the maintenance in 1649; and, by the Act of Grace in March 1674, all these taxations are discharged.

Answered,—The Act contained an exception, where bond was granted for them; and here a decreet compearing was obtained for it long before the Act, which was equivalent, since the same execution passed on decreets that passed on bonds. Next, they were only seeking relief of what they had paid for Carnwath's father.

Replied,—*Statuta sunt stricti juris*, and so cannot be extended to the case of decreets.

This point being reported to the Lords by Harcous, they found the debt fell

under the Act of Grace, and therefore assoilyied. *Vide* the information in it. *Vide supra, num.* 667, [*November* 1677.] *Advocates' MS. No.* 715, *folio* 317.

1678. *January* 29. The TAILORS of EDINBURGH *against* NICOL HARDY.

THE Tailors of Edinburgh obtain a decreet of neighbourhood, as to their land in the Cowgate, against Nicol Hardy, writer to the signet; who presents a bill of suspension, bearing, that his brewhouse and building was conform to a contract betwixt his father and the incorporation in 1642, and betwixt himself and them in October last.

The Lords ordained Harcous to visit the ground and report; who did so, and settled them in sundry of the controverted points, and ordained Nicol to rectify some parts of his building. And there was an ambiguous clause in the last agreement, that he should raise it no higher than the present building. See the informations of it beside me. *Advocates' MS. No.* 716, *folio* 317.

1678. *January* 29. AGNES WILKY, Relict of Henry Morisone, *against* CHRISTIAN MORISONE and GEORGE STUART her Husband.

AGNES Wilky, relict of Mr Henry Morisone, writer, obtains a decreet against Christian Morisone, sister and heir to the said Henry, for implement of her jointure, and against George Stuart of Auldhame, advocate, her husband, for his interest; and thereon charges and denounces them both. Then, Christian dying, Agnes pursues George Stuart for payment. The Lords, on my Lord Pitmedden's report, found George, the husband, was not liable, except only *in subsidium*, in case payment be not recovered of the heir of the wife; and that the heir of line to Christian behoved first to be discussed, and so gave him *beneficium ordinis discussionis.*

Then Agnes gave in a bill, craving the interlocutor might be re-considered, and George at least might be principally and immediately liable *in quantum* he was *lucratus* by the marriage. This day the Lords refused this bill.

Mr Francis Montgommery was just stated in the like case, in a pursuit moved against him by the Lord Melvill.

There was another point debated in the said Agnes her process. She was provided to an annualrent of 400 merks furth of a tenement, which the heir caused to take down as ruinous; she contended he behoved either to rebuild it or be personally liable. The Lords ordained both parties to adduce probation anent the condition the houses were in the time of the contract of marriage; and if what the heir did was incumbent for a provident man, or if he willingly took down the houses when there was no necessity for the same.

The said Agnes, in the foresaid bill, urged the Lords' answer *in jure* upon the point; but they refused it. See the copy of the bill beside me. *Vide* Dury, 17*th January* 1622, *Hamilton* and *Sinclair; 5th July* 1623, *Brown* and *Wright.* *Advocates' MS. No.* 717, *folio* 317.

1678. *January.*—About the same time, the following cases fell to be debated and decided, which I shall only touch here, and refer to the Information for farther understanding thereof:—

I.—Campbell and Menzies *against* William Naper of Wright's-Houses.

William Naper of Wright's-houses, being charged on his bond by Campbell and Menzies her spouse and their assignee, suspends on compensation. Alleged, It was taken away by a discharge. Answered,—The clause was only general, and did not extend to such cases. The Lords (Glendoick being reporter) found the discharge met not. *See Sir A. Ramsay's case* with *Francis Kinloch, supra. See 14th December* 1678, *thir parties.*

II.—Alexander Todridge *against* Patrick Androw of Barborland.

Alexander Todridge, tacksman of the King's Park of Halirudhouse, pursues Patrick Androw of Barborland for the damage done to him by the said Patrick's dog, in worrying his lambs and sheep, after he had intimated to him his scaith; like the case of the pushing ox in the 2d of Exodus. Alleged,—He had killed him, and so could seek no farther amends: besides, by the chapter of the statutes of King , he who kills his neighbour's mastiff ought to keep his midding for year and day. Besides, he cannot now *noxæ dedere*, which was permitted, as appears by the Title, *Si quadrupes pauperiem fecerit.* Answered,—Alexander did not shoot him till he had twice or thrice intimated to the defender to keep in his dog; but he maliciously would not do it, and so that cannot excuse him from the damage done. Glendoick, notwithstanding of this, found him liable for what scaith he had done after intimation made.

Then alleged,—Alexander must prove he worried each individual libelled, since other dogs might do it as well as he. Answered,—That was impossible *in facto latente;* but the probation behoved to be somewhat privileged here like to a spuilyie: if he proved that it was seen kill some and grapple with others, it is to be presumed *quoad* the rest, unless they will positively offer to prove they were killed by other dogs. Glendoick repelled the allegeance, in respect of this answer.

III.—Marshell and Mathers *against* John Mayne.

In the suspension, Marshell and Mathers against John Mayne, one inferior judge cannot grant letters of supplement for charging persons within their jurisdiction to compear before another inferior court, but such letters must be directed by the Lords. *Item*, the party in whose hands the arrestment is laid on, cannot allege the debt is paid, for that is *jus tertii* to him. See Dury, *21st December* 1621, *Hamilton.* And if the party called for his interest allege it is suspended, he must repeat his reasons of suspension instantly by way of defence. It is relevant to allege the affair is submitted, and a decreet-arbitral

pronounced thereon; but *quæritur* if the judges arbitrators may be examined thereon, since he should prove *scripto vel juramento.*

IV.—Jo. Webster *against* Margaret Hay, Lady Kettleston.

Jo. Webster's decreet against Margaret Hay, Lady Kettleston, for an account, to herself and daughters, of tailor-work, turned by Forret into a libel, in a suspension: 1*mo*, Because an error in the calculation of the sums; 2*do*, The daughters were not *ab initio* called, but by an act *ex post facto*, and only holden as confessed upon the furnishing and quantities; 3*tio*, Some of the account prescribed *quoad modum probandi*, being without three years; 4*to*, Some of it furnished in the husband and father's time, and so could not affect them, unless they were proven to represent him.

V.—Todd *against* Young.

The mutual suspensions and charges betwixt Tod, the skipper, and Young, his prentice, upon the indentures, resolved in an act of joint probation that the prentice offered his service and was refused; and the other, that after that he required him.

VI.—Mr David Home and Barbara Weir *against* Mary Greirsone.

In the action Mr David Home and Barbara Weir, his spouse, against Mary Greirsone, relict of Robert Herries; found vitious intromission of one that is dead, cannot be proven after his decease, so as to import a passive title. See Stair's System, *titulo* 31, *pagina* 629, in the case of *Wilkiesone*, decided in 1666. *Item*, A tenant having paid a promiscuous duty to his master, both for stock and teind, and got his discharge; that, it seems, ought to liberate him, at the hands of the titular of the teinds, especially *post magnum temporis intervallum.*

VII.—Marion Comblin *against* William Corbie.

In the reduction pursued by Marion Comblin against William Corbie, in Dumfreis, a charge to enter heir was quarrelled as null; because it neither bore that the party was cited personally, nor at their dwelling-place; but they slipt it up, and mended it, and offered to abide at it.

VIII.—Mr James Ramsay, Bishop of Dumblain, *against* Sir John Forbes of Monymusk and Others.

In the improbation pursued by Mr James Ramsay, Bishop of Dumblain, against Sir John Forbes of Monymusk, and many other Vassals; his gift in general, to the obventions of the bishopric, was found a sufficient active title to pursue on.

IX.—Anna Helena Scot and Edmiston of Duntraith, her Husband, *against* Sir A. Ramsay.

Sir A. Ramsay being pursued by Anna Helena Scot and Edmiston of Dun-

traith, her husband, as she who stands infeft in the Mains of Waughton, for reduction of the rights he had thereon, and for proving the same to be paid: the Lords appointed a count and reckoning amongst the parties, and nominated Colinton auditor, (it being his tour that week,) and assigned the pursuers a day for proving a true rental of the Mains. We gave in a bill for Sir A., craving a joint probation of the rent; but the Lords refused it. There were two points they aimed to debate; but the Lords waved them, and referred them to the auditor: the first was, That Sir Andrew and his authors might count for the haill rent, whether they got it or not, since he ought and should have intromitted, others being debarred by them,—as has been decided in first apprisers,—at least they were obliged to intromit so far as fully paid them their annualrents; so that they can allege no annualrents to be resting. The second was,—That, for sundry of these preferable rights, they had infeftments out of other subject matters, as the lands of Balgon, &c.; or were paid by possessing or selling lands by virtue of apprisings, &c.; and they behoved, either to betake them to these rights, and not prejudge maliciously the pursuer's access to the lands wherein she stands infeft, or else assign them for her relief.

X.—Mr Charles Home *against* The Bailies of Edinburgh.

The Bailies of Edinburgh having fined Mr Charles Home, brother to the Earl of Home, in £50 Scots, for beating one Johnstoun; he suspended,—That the decreet was in absence, he not being personally apprehended, and so was not liable to their jurisdiction; since *locus delicti* makes a *forum competens*, and founds a jurisdiction there, providing the delinquent be attached and apprehended; otherwise sheriffs, justices of peace, bailies of burghs, &c., cannot judge in absence, except those who were their own citizens, and dwelt within their territories. Castlehill inclined to sustain this.

2do Alleged,—The fine was exorbitant, and above their power. *Vide supra*, *8th November* 1676, [*Abernethy* against *Bailies of Leith*, No. 505.]

Advocates' MS. No. 718, *folio* 317.

There were, at this same time, sundry actions depending, wherein I was concerned, that had interlocutors passed in them; of which I shall only mention the parties' names here, and refer to the informations beside me.

There was a pursuit by Francis Laurie, &c., against Thomas Brown; *item*, against Elizabeth Gibsone; upon the passive titles, to count and reckon for their father and husband's proportional part of the excise of the brewing; as to which they were in a society and copartners.

There was an action of the same nature pursued by one Pollock (who was assisted by Mr George Campbell in it,) against Thomas Robertsone.

The said Thomas was likewise concerned in another process, betwixt Borlands and his brother; wherein they offered to prove Thomas his infeftment in their lands of the King's Stables at the Westport, was satisfied.

Item, John Boswell's action against William Cunninghame, in Lington of Abbotshall, and his wife.

Item, My Lord Cardross and his Lady's advocation against Robert Campbell, apothecary, about his infeftment in the thirteen oxengates of land in Strathbrock, formerly belonging to Mr William Oliphant and Blackcraig. Of which, see Dury, 1631,

Item, Sir John Harper against Inglis of Murdiston.

Item, Brown of Nunton against the Town of Kirkcubright; for whom this allegeance was sustained,—They stand infeft, *cum piscationibus* in general, without mentioning *salmonum;* and, by virtue therefore, in forty years' peaceable possession of salmon-fishing; which, albeit *inter regalia*, yet this was enough for a burgh-royal. See Stair's System, page 231. See Dury, *26th March* 1628, *Maxwell.* See, *7th December* 1678, thir same parties.

Item, The Lords of Session refused an aliment to the heir of Kingston, furth of his father's estate, during the dependance of his reduction, founded on his uncle Archibald Douglas of Whittinghame's tailyies; and rejected his bill.

Advocates' MS. No. 718, *folio* 317.

1676, 1677, *and* 1678. SIR JOHN SETON of GAIRLETON *against* GEORGE SETON of BARNS.

1676. *July.*—SIR John Seaton of Gairleton convenes George Seaton of Barns before the Secret Council, for oppression and riot, in casting down a dry-stone dyke Gairleton was building on the march betwixt them, for taking in a park.

Barnes ALLEGED he had done no wrong; because he had encroached upon his land, and was going to enhance, appropriate, and inclose a well, which not only served his beasts, but also made a mill he had to go, with some derived help. *2do*,—He had used civil and legal interruptions, *per novi operis nuntiationem super damno infecto, quod nondum quidem factum est, sed fieri timetur*; (see these titles D. and C.;) and they not desisting nor finding caution, he might stop *per viam facti.* Yet see *Joannes Vandus, libro 2, Quæstio* 30; who says; it must be *authore prætore. Vide supra*, in the case of *Kirknes*, No. 475, [*June* 1676.]

And whereas he pretends he had power, by the 17th Act of Parliament 1669, to keep his dyke straight, to take somewhat of the adjacent neighbour's lands,

It is ANSWERED, 1*mo*,—That is for encouragement of parking; but this cannot be called a park. *2do*,—Since he has appealed to that Act of Parliament he must stand to it. It appoints the same to be done at the sight of the sheriff, and not *privata authoritate.* See the rest in the Informations.

The difference was settled by the mediation of my Lord Dundonald; and it was but reason it should be so: for as Abraham said, in a like contest about a well, to Lot,—"Why should we contend together, for we are brethren."

Advocates' MS. No. 485, *folio* 250.

1677. *February.*—In the declarator pursued by Seton of Barnes *against* Seton of Garleton, anent his right to the aqueduct of his well, &c. Garleton

offering to prove it was in his ground, a visitation act and commission was appointed by Colinton, before whom it was debated. Then, upon a bill given in by Barnes, the Lords named Newbyth and Gosfoord to perambulate and take inspection of the ground, and receive the depositions of witnesses to be adduced by either party, anent the property, and possession past memory, &c. (See the information.) Who met, upon the ground, on the 9th of May, and considered, from point to point, if my Lord Dundonald's decreet-arbitral betwixt them was fulfilled; then examined four witnesses for either party, anent the property of the strand and aqueduct, and Barnes his use of casting the same, &c. *Advocates' MS. No. 553, folio 278.*

1677. *November* 14.—Sir John Seton of Garmilton having charged George Seton of Barnes, upon a decreet of the Sheriff of Hadington, finding that some of Barnes his cattle had come upon an inclosure in Garleton's ground, and therefore fining him in £5 Scots for each beast, conform to the Act, in the Parliament 1661: Of this decreet Barnes raised suspension and reduction, upon iniquity, that the sheriff had refused a visitation, and found it to be an inclosure, upon the testimonies of some of Garmilton's own servants; and that it truly had none of the qualifications required, by the foresaid Act of Parliament, to a privileged inclosure.

The suspension coming first to be called,—Newton repelled the reasons, as not instantly verified, and found the letters orderly proceeded; superseding extract for a month, in which time Barnes might insist in the discussing of his reduction. Before the elapsing of this time, on the 21st of November, we gave in a bill to the Lords, representing, that our reduction was now ready; and, for the speedier dispatch, to verify our reasons, the process led before the sheriff, and the principal depositions of the witnesses would be necessary; therefore craved a warrant against the sheriff-clerk, to send them in.

The desire of this bill the Lords granted. And Barnes having charged him with horning, he transmitted the haill process to Mr Thomas Hay; after which, upon a new bill, we got it remitted to Newton, to compare the probation with the decreet, and with the reasons libelled against it, and, after perusal, to report:

Which he having done on the 26th of February 1678, the Lords found the said decreet unjust; and therefore reduced and suspended *simpliciter*.

We were not expecting so much; but only that the Lords should have turned it to a libel, and appointed a visitation and perambulation on the ground, for cognoscing if it was truly such an inclosure as was meant by the foresaid Act of Parliament. See the copy of the decreet, and reasons against it, *apud me*. Anent the evoking and transmitting processes in inferior courts, see an instance, *supra, num.* 623, *Sir A. Ramsay*, [*26th July* 1677.]

Advocates' MS. No. 655, folio 307.

1678. *February* 2.—In the declarator of property, or cognition and perambulation of molestation of the meiths and marches, between Seton of Barns and Seton of Garmilton, (of which *vide supra*, No. 553,)—the probation and report of the commission being this day advised, and the Lords having considered the report made by the Lords Newbyth and Gosfuird, visitors, adhere to the said report, in so far as they have determined the matter in question. And siclike, having considered Garmilton's oath and deposition, and the testimony of the witnesses adduced, they find, by Garmilton's deposition, That the stone dyke of the park is rightly situated, according to the Earl of Dundonald's

decreet-arbitral; and find that Garmilton should make a stone pend in the park-dyke, sufficient to let the water go out, not being of that wideness to let in or out beasts. And find that the water-gang, from the park-dyke to Barnes his mill, ought to continue in the old channel; and that the channel wherein it now runs is the old channel; and that the said water-gang, from the ston park, is the march betwixt Barnes' and Garmilton's lands; and that the water running therein can suffer no division; and the diversion made by Garilton ought to be restored, so that the water may run entire in the old channel. And find that Garilton's feal-dyke, at the east end thereof, is built, by the space of a pair of boots, on Barnes his land; and that therefore the same ought to be demolished, by the said space of a pair of boots. And find that both Barnes and Garmilton may, at their pleasure, cast the foresaid aqueduct and water-gang; and that, in their casting, they ought to do no prejudice, either of them, to other's lands, or to the feal-dyke built by Garmilton, except in so far as the same is ordained to be demolished; and that the mud and earth, to be cast out by either party, when they dight the aqueduct, ought to be casten, the one half thereof on Barnes his side of the aqueduct, and the other half on Garmilton's side: and decerned accordingly.

On the 6th of June 1678, Garmilton having given in a bill to the Lords, complaining of this decreet, (for it was not then extracted,) and craving the Lords would readvise the probation; and answers being made to it,—The Lords refused the bill, and adhered to their interlocutor.

Advocates' MS. No. 719, *folio* 318.

[See the subsequent part of the Report of this Case, Dictionary, page 10,476.]

1678. *February.* ANENT INHIBITIONS.

ONE serves inhibition on a personal bond,—himself is afterwards inhibited by one of his creditors,—he, notwithstanding, uplifts the money, and discharges the bond. *Quæritur* if his creditor who inhibited him can reduce the discharge *ex capite inhibitionis*. Some think he cannot; because such a bond is not made heritable by the inhibition *quoad* the succession, so as to make that bond fall to an heir: others affirm he can; because, at least, it is heritable *quoad* the security. *Vide supra, num.* 281, [*Eleis* against *Wishaw, 5th December* 1671.]

ANENT ADJUDICATIONS.

II.—*Quæritur* if one may adjudge in the new form, according to the Act of Parliament in 1672, lands already apprised, whereof the legal is not yet expired; or, if they must, of necessity, apprise them by that act; and whether the said act makes it *necessitatis* or *voluntatis* to the creditor.

ANENT *JUS RELICTI*.

III.—Where a man dies having no estate but bonds bearing annualrent, out of thir his relict can have no third, because they are heritable *quoad relictam*,

by Act 1641 : neither can she have a terce, because they are not heritable in themselves. *Quid juris?* Shall she have no provision at all? Has our law no remedy? Is it here mank? May she not get an aliment decerned to her, effeiring to the estate?

Anent the Annualrent of Bonds.

IV.—In a bond, the term of the payment of the annualrent is one, the term of the payment of the principal is another; all such sums before the term of payment are moveable, where either parties, whether debtor or creditor, deceases before the said term. *Quid juris?* Whether will it be understood to be moveable before the elapsing of the term of payment of the annualrent, or the term of the principal sum? *De hoc dubitant Doctores.*

Anent Cautioners.

V.—The Lords have found, where a cautioner pays the debt, the creditor is not bound to assign him, but only to discharge. Let him age upon his clause of relief, as accords. Yet it is *civilius (humanius)* to assign him. *An correus totum solvens adversus cæteros actionem habeat citra cessionem,*—see Vinnius *ad* § 1, *Institut. de Duobus Reis Stipulandi, num. 4to.*

Anent a Debtor Cutting his Woods.

VI.—A debtor cuts his woods and planting to a considerable value; the comprisers, or other real creditors, would hinder him: *Quæritur* how it can be done. An inhibition reaches not, because they are *mobilia;* yet they are *pars soli* before separation, and not like to corns, which are arrestable even upon the ground, because their use is to be reaped and separated once a-year. A summons or declarator may be raised, or a bill of inhibition given in, not to pass of course, but by special notice of the haill Lords; or a petition, representing the matter of fact to the Lords.

Anent Advocations by Members of Session.

VII.—It may be questioned if the Act of the Parliament 1555, anent advocating causes of members of the Session from inferior courts, can be extended beyond its rubric, which is only of actions of removing, since Everhardus in his *loci legales* shows us it is a good argument *a rubro ad nigrum;* and that Act speaks of no other; though I see no reason of disparity why it shall be denied in others more than in this; and custom since has explained it *quoad* all: though it may be said that custom here is not enough, being only usurped against the lieges by them who are judges in their own cause. See more of this *supra,* [No. 161.] *versus finem.* *Advocates' MS. No.* 721, *folio* 318.

1678. *February* 6. Mr Roderick Mackenzie *against* John Watson.

The case of Mr Roderick Mackenzie, advocate, and John Watson, was this

day, on a report, decided. It was thus:—There was a bond, blank in the creditor's name. Hector's name was filled up in it; and, at the filling up, he grants a back-bond, declaring it to be merely in trust, to the behoof of, &c. Thereafter, Hector's creditors arrest this money in the debtor's hand. He to whom the back-bond was given, compears for his interest, and, by producing the back-bond, proves the money arrested to be his. (See Dury 14*th November* 1628, *Cumming*. See the Compend of Durie's Decisions, *verbo* Bands. See this decision elsewhere. See *22d February* 1681, Poor of the West Kirk.)

Answered,—The back-bond never being intimated, it can produce and found no more but a personal action against Hector, the granter; for the fee and property of the money, stood in Hector's person; and, if such back-bonds were allowed, it would open a door to all cheats. Replied,—The back-bond made the money his to whom the back-bond was given. That *teneris scire conditionem ejus cum quo contrahis, L. D. de Regulis Juris.* That, where a bond is apprised or adjudged, of which there was a discharge anterior, yet the discharge meets the assignee though it be a latent deed. See of discharges of bonds or tochers, of the same date with the obligements, *supra, No.* . See also of mutual and co-respective obligations, *supra*, [No. 377, *December* 1672,] in the *Master of Salton's* case.

The Lords found the back-bond needed no intimation, and that it affected the money so that it could not be arrested for the person's debt whose name was filled up in the bond, if the back-bond was truly of a date prior to the arrestment.

This decision was thought very strange by some; yet the Lords had formerly decided the same case thus: yea, they had found the same before, in a stronger case, *viz.* though it was comprised by the trustee's creditors from him, yet that the back-bond met the said singular successors.

The Lords were as sensible as any, of the many and great inconveniences which followed this decision: but wished a Parliament might remeid it, by ordaining such back-bonds to be registrate; for the Lords could not help it.

Advocates' MS. No. 722, folio 319.

1676. *December.* Case of the Ship called the Calmer.

In December 1676, the King wrote a letter to the Lords of Session anent the ship called the Calmer, with Sir Lionell Jenkins, one of the Judges of the Admiralty of England, complaining the Lords should have declared that ship prize, only because some few in the ship were Hollanders; which could not, in law, infect the rest. This was charged upon John Inglis, and he blamed for informing the Swedes' resident, and the College of Commerce of Stockholme. The Lords wrote up a vindication of themselves in that affair, and a defence of our custom for not-publication of the testimonies of the witnesses whereupon it was adjudged and found prize: though it was alleged this concealment was only used in courts of equity in other parts of the world, where the parties get not leave to hear the witnesses' depositions; but, in all courts of law (such as is the Session) all the world over, the depositions of the witnesses are patent, and are so with us: for there be few parties and their advocates but *viis et*

modis they get a sight of the testimonies. It would seem this apology has not satisfied; for the King, notwithstanding thereof, by his letter in April 1677, has called for the depositions and whole minutes of that process to be transmitted to him, and ordains the parties concerned to attend him at Whitehall. And John Cunyghame of Entirken, the King's writer, raised the summons for that effect, being of a new style, and unheard of before. Which is a most extraordinary Act, and astonished all: for, besides that it may be used as an argument of our dependance on England, all other processes may, on misrepresentation, be remanded to Court, and revised and recanvassed there; so it is a sore wipe upon the Lords, as suspected of great injustice; and is, by the most knowing persons, called twenty times worse than Almond's Appeal from them to the Parliament, (of which *vide supra*, No. 445, in February 1674,) or the advocates' address.

But, in the beginning of June 1677, his Majesty, being better informed, writes down a new letter to the Lords, retracting the former, and declaring the decisions of the Session shall be ultimate and definitive, &c. Yet see the treaty marine between our King and the French, in February 1677, article 12. It is hard to make a King contradict himself in a month's time.

Advocates' MS. No. 516, § 11, *folio* 269.

1677. *July 27.*—The case of the Calmer ship (*de quo vide supra*, No. 517, § 11,) being again debated this day, the Lords, of new, adjudged that ship, and found it prize. And the President tartly reproved John Inglis for blowing up the poor strangers, and making them believe the Lords had done them open and manifest iniquity and injustice, and either understood not, or decerned not conform to the law of nations. But, on the 31st of July, John Inglis having obtained a new hearing, they sustained this defence relevant to liberate and free that Calmer ship; that Secretary Coventrie had a power to fraught the ships either of enemies, or allies, or neutrals, for his Majesty's service; and that this ship was one which was accordingly so fraughted by him. And upon this knack, in a trace, did the Lords retract four consecutive sentences of their own, finding it prize; and they now declared it free, for it was generally opined to be a free ship. Some thought Lauderdale influenced this change. There was much debate in this cause from the law of nations.

Advocates' MS. No. 627, *folio* 298.

1678. *February* 7.—This day the Lords, of new, advised the affair of that prize ship, called the Calmer; and, because of John Inglis, advocate, his passion in this action, anagrammatized the clamour: and found the allegeance of competent and omitted was *juris positivi* and municipal, and so extended not to strangers; but that the allegeance of proponed and repelled was *alterius fori*, and touched the sovereignty of the court, and would meet strangers as well as others. And, to knock the haill business in the head by the overruling power of the King's letter, impetrated by the Swedes' ambassador, and complaining of the Lords' procedure in the matter,—for there were four consecutive decreets finding it prize,—they indirectly reversed all they had done, and took it quite off the file, and found it a free ship, unless Souton, the master of it, should depone upon oath that it belonged to Holland. Now, Souton was clear to depone the contrary; and this did so order the probation, that, if Souton had died *medio tempore*, the ship would have been simply free.

Advocates' MS. No. 724, *folio* 319.

1678. *February* 21. Sir Alexander Bruce of Broomhall *against* Stewart of Innerneytie.

Sir Alexander Bruce of Broomhall, as donatar to the marriage of Stewart of Innerneytie, pursued him for the double avail of his marriage. The defence was,—That he was not required to marry till they knew he was contracted to another gentlewoman; and then *dolose* they required him when engaged: which was fradulent; and Craig, *Tit. de Maritagio, pag.* , tells us, *Omnis fraus et dolus abesse debet.* This the Lords found relevant; it being also offered to be proven, that the gentlewoman offered was, at the very time, upon the tryst of another marriage, and *de facto* was married within twenty days after the requisition; and that she had passed through Broomhall and Mr D. Dewar's hands. This did not so much move the Lords, as that Innerneytie has paid 25,000 merks before, as the single avail of this same marriage; the highest modification has been made in Scotland of a gentleman's marriage. This consideration had some influence on the Lords' decision.

Advocates' MS. No. 728, *folio* 820.

1678. *February* 26. John Ormiston *against* William Ancrum.

John Ormiston, in Kelso, pursues William Ancrum to remove from lands, before the Sheriff of Roxburgh.

He raises an advocation on this reason,—That he likewise stands infeft in the lands, and so there will arise a competition on double heritable rights, to which the Sheriff cannot be judge competent.

Answered,—Though the Sheriff was not competent to judge the validity of double infeftments, yet here we were not in that case; because this Ancrum was the disponer of the wadset to Turner, who had assigned it to Ormiston, and so he could never quarrel it.

Yet Craigie advocated the cause, because the wadset contained a back-tack, that Ancrum should possess upon paying the annualrent: notwithstanding, I alleged it was under a clause irritant that the back-tack should be *ipso facto* null and expire, if two terms did run in the third unpaid; which he repelled, because the failyie was not declared: but he allowed me to convert my action into a declarator of the failyie, for not paying the back-tack duty, and therefore that he ought to remove; and ordained Ancrum to answer thereto *hoc ordine*, without any other formality. *Advocates' MS. No.* 731, *folio* 321.

1678. *February.* The Earl of Winton *against* Jo. Hope of Hopeton.

The Earl of Winton charges Jo. Hope of Hopeton to perform the deeds contained in his bond: he presents a bill of suspension upon performance of some, and retention for the feu-duties, the rests, and some acres in the rental: to which see our answers. *Advocates' MS. No.* 732, *folio* 321.

1678. *June* 6. MARGARET COCKBURN *against* MARY ERSKINE and —— HAIR, her Husband.

MARGARET Cockburn pursues Mary Erskine, and —— Hair, now her husband, for payment of sundry sums contained in Robert Kennedy her former husband's bonds, and convenes her as representing him on the passive titles. ALLEGED,—*Absolvitor*, because offered to prove the relict, defender, was executrix confirmed *qua* creditrix for implement of her contract matrimonial and liferent provision. REPLIED,—*Non relevat*, unless the inventary of the testament be also proven to be exhausted by the debt owing to herself. The Lord Newton found the allegeance of confirmation not relevant *per se*, unless they also complexly said the inventary was thereby exhausted. *2do*, REPLIED for the pursuer,—The confirmation cannot liberate from the passive titles, because offers to prove superintromission beyond what was confirmed. DUPLIED,—This is *jus tertii* to the pursuer, who had no title, and it was not competent *hoc loco*. The Ordinary found the pursuer could not reply on superintromission, unless she had taken a dative *ad omissa*.

Then ALLEGED,—*Absolvitor* from the bond, because null of the law, wanting witnesses. REPLIED,—The pursuer takes instruments on the defender's proponing this, which is a peremptory defence, as a downright confession and acknowledgement of the passive titles. *2do*, *Et separatim*, The bond bears itself to be holograph, and, if need be, offers to prove it to be so by witnesses, who knew the defunct's hand-writ; the defender always first giving her oath of calumny, if she has just reason to deny the same. DUPLIED,—A peremptor of payment, compensation, or the like, cannot indeed be proponed by one who denied the passive titles: but this objection against the bond being a mere nullity of the law, and instantly verified by the writ itself, it may be proponed by any, without concession of the passive titles.

Newton repelled the defences and duply, in respect of the reply; and found the defender, if she denied the passive titles, could not quarrel the bond upon that nullity. Then compearance was made for the husband, and the nullity proponed by him. It was found, since he was husband, and called *pro interesse*, he could not either. Then it was contended, the husband was donatar to Kennedie's bastardy, and so *eo nomine* might propone it. The gift of bastardy was ordained to be produced; which, being done, I found it was granted to Erskine the defender. So that it may be contended, the donatars to bastardy, as well as last heirs, in law are obliged to pay the defunct's debt; and so no other passive title needs to be instructed against her. As for the superintromission, the pursuer might take a dative *ad omissa* from the Commissaries, and use it in the same process, to found her title. In some cases, where the fraud and dole in omitting is palpable, they use to receive superintromission by way of exception; as they did in the count and reckoning betwixt William and John Andersons this same year 1678: but I think an offer to confirm the concealed goods, and to produce a dative before extracting of sentence, should be receivable to liberate from the trouble, expense, and delay of raising a new summons, and thereby multiplying processes. *Vol. I. Page* 1.

1677, *and* 1678. ——— SETONS, Heirs-Portioners of Blair, *against* LORD PITMEDDEN.

1677. *28th January.*—The two daughters Seton of Blair's reduction against Sir Alexander Seton of Pitmedden's adjudication [was this day] advised, wherein the Lords found the cause of the disposition from his brother James near onerous, and admitted sundry points to probation; *quæ omnia vide ad longum* in the information *apud me: infra, numero* 574, § 6. See this again advised on the 12th of June 1678, marked by me in the third page of my other manuscript book. *Advocates' MS. No.* 538, *folio* 274, *margin.*

1678. *June* 12, 13, *and* 22.—The Lords advised the actions betwixt —— Setons, heirs-portioners of Blair, and the Lord Pitmedden. The Lords had ordained him to prove he had paid the usual rates lands were then giving in the country, for the acquisitions of Pitmedden and Alethin, which he had purchased from his brother James; otherwise, they would reduce these rights on the Act of Parliament 1621, as *inter conjunctas personas*, without a full onerous adequate cause, in prejudice of the absolute warrandice of the said James his brother's disposition of the lands of Blair to their father. And he having led probation thereon, and proven, with the incumbrances that affected it, and which he hath since relieved, or must take course with, he had paid £1000 Scots for each chalder, which was and is the price of the country in Buchan, even counting his patrimony only at 12,000 merks:

The Lords found an adequate price proven, and assoilyied him from their reduction. *Vide Informations hinc inde*, for the particulars in this case.

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1678. *June* 14. DAME MARGARET BAILLIE, Lady Luss, and SIR ROBERT SINCLAIR, *against* The LADY IDINGTON.

DAME Margaret Baillie, Lady Luss, and Sir Robert Sinclair, now of Lochend, advocate, pursue the Lady Idington, and the other seven daughters of Mr William Kelly, and the representatives of such of them as are dead, upon the 57th Act, Parl. 7, James III. to enter to the superiority of some lands in Newton-Leys, to the effect they give infeftment to the pursuers of the property; otherwise that the pursuers might be infeft by the King, upon precepts furth of the King's Chancery, and they lose their superiority *ad vitam.*

In this process some of the defenders compeared, and offered themselves willing to enter the pursuers, and give them either a charter, or precept of *clare constat*, in so far as concerned their shares and proportions. The pursuer alleged, She was not obliged to enter that way, except all of them concurred jointly, and were ready to enter her *quoad* the whole; else this were to divide her security, and make it party-coloured, the one half holden of them, and the rest of the King; and the superiority was *jus individuum*, and she could not be put to double charges, but behoved to be entered either wholly by them or wholly by the King.

ANSWERED,—The contumacy of those heirs-portioners who compeared not, could neither in law nor reason be prejudicial to the rest, who were willing to enter the pursuer as to their parts.

This being taken to the Lords' answer, and reported upon the 30th of July 1678, the Lords found the eldest daughter and her heirs were only liable in law to enter the vassals; the superiorities, as indivisible, belonging to her; but the obventions, and emoluments redounding therefrom, were divisible among all the heirs-portioners. See, anent this, a remark in another MS. which begins with the account of the General Assembly held at Glasgow in 1638, *fol.* 29.

N.B.—In regard of the contumacy of the eldest, he was admitted by the King. *Vol. I. Page 2.*

1677 *and* 1678. SIR ANDREW BIRNIE'S DAUGHTERS *against* MURRAY of POLMAIS'S BROTHER.

1677. *June* 26. IN the case of Sir Andrew Birny's daughter, and Morray, brother to the Laird of Polmais, it was doubted if it can be called *donatio inter virum et uxorem*, so as to be *ad libitum* revocable, where a wife is not anteriorly provided. To me it seems very clear and reasonable that a wife not *aliunde* provided, getting a jointure established on her *stante matrimonio*, it should not be revocable, as if it were *donatio inter virum et uxorem*, but should be reputed *donatio propter nuptias*, and subsist in so far as it is a moderate provision. (See this decided on the 15th and 22d of June 1678.) See Corser and Lutfuit's information, where our reason of reduction run upon this head, That the disposition given to the wife by the husband was *stante matrimonio, et tacite* revoked by the posterior disposition made by Corser to his brethren; and it is the very same reason whereupon, in Alexander Arbuthnot of Knox his information against Colonel Hary Barclay, the provision made by the said Colonel to his Lady during the marriage, is quarrelled. See both informations. *Vide infra, numero* 607, [17*th July* 1677, *M'Kenzie* against *Rosse.*]

II.—In this same cause it was debated,—Where a disposition is subscribed *inter vivos in liege poustie*, only the name is left blank, if it be filled up *in lecto*, whether the disposition can be quarrelled as done in death-bed. *Divus Marcus, Imperator, in lege* 11, *in fine, C. de his quibus, ut indignis, hæreditas auferatur*, says, *Nil actum credo si quid supersit agendum, ex Lucano.* See Craig, *Feud.* p. 91; and it is the *ultimus actus* that consummates it, and the nomination of the person is what perfects the disposition. Yet the last Earl of Erroll had a power and faculty from his Majesty to fill up in the blank whom he pleased, *etiam in ipso agone et articulo mortis. Vide supra*, February 1670, *Mossman* against *Bell*, No. 7. See the case of Doctor Cunyghame's heir *alibi* debated.

Advocates' MS. No. 580, *folio* 288.

1678. *June* 15.—The cause between Sir Andrew's Birnie's daughters and Murray of Polmais's brother, (see 26th June 1677,) coming this day to be advised, it was OBJECTED,—The cause cannot be advised, because not concluded,

in so far as an Act renouncing farther probation was not as yet extracted. ANSWERED,—That old form was now in desuetude, and there [was a] signature and minute of process under the Clerk's hand, whereby the parties had called their Act in the Outer-House, and did renounce further probation; which was enough.

The Lords, for the benefit of the Clerks, revived the said old form and custom; and, by an Act of Sederunt, declared they would hold no cause as concluded till there was an Act of Renunciation of farther probation extracted and lying in the process. *Quid si* the other party has not as yet renounced his probation, and the term is not circumduced against him?—I think it should stop advising, till there either be an Act renouncing, or the term be circumduced against him.

This put a delay to the advising of Sir A. Birnie's cause till the 22d June 1678, in which day he gained the action; and the Lords found the filling up a disposition blank in the name of the party, on death-bed, equivalent to subscribing it on death-bed.

N.B.—There was no dispensation granted to the disponer, to nominate whom he pleased, *etiam in articulo mortis;* of which faculty, if legal, see more *alibi*, in Doctor Cuningham's case and others. *2do*, They found a husband might provide his wife, *etiam stante matrimonio*, to a moderate provision, effeiring to his estate and fortune; (whereof the Lords will take trial, as they did in this same case;) which the Lords will restrict to a terce or a third, which is the legal subsidiary allowance *ubi deficit provisio hominis*, where she is not provided *aliunde;* and they found such a moderate provision was not *donatio inter virum et uxorem*, though done *stante matrimonio*, and so was not revocable; yet the Lords kept it *in scrinio arbitrii*, according to circumstances, to moderate and qualify the said provision, and either exceed a third and terce, or go below it as they see cause. See 17*th June* 1676, *Mitchel.* *Vol. I. Page* 3.

See reports of this case by Stair and Gosford; Morison, 6124, 6126, and 3242.

ANENT BONDS of CORROBORATION by SONS.

A FATHER grants a wadset furth of some lands; his son (after the father's death or before *non refert,*) grants a bond of corroboration of that wadset; the son is charged with horning on this bond. *Quæritur* if this looses the real right of the wadset, and renders it moveable so as to fall to executors, under escheat, &c. The lawyers were divided upon it. Some thought not, because the securities were different, granted by sundry persons at several times. Others said, they were *super eodem subjecto;* and, if it was the eldest son, he was *eadem in jure persona cum patre suo.* *Vol I. Page* 3.

ANENT *BENEFICIUM INVENTARII* in HERITAGE.

SOME think that it were equal and just to give heirs the *beneficium inventarii* in heritage, (as Justinian does in *L. ult. C. de Jure Deliberandi;* and Craig in his private opinion inclines, in some cases, the heir after immixtion should be permitted to abstain, and be only liable *in quantum ad eum pervenit; p.* 153 and 257;) as well as our custom gives it to the executor, who is heir *in mobilibus;* and that there is more reason in the first case to allow it, since heritage is of

more moment, and so the adition more dangerous. Others are of opinion, that it would be a great bar against apparent heirs their cheating their predecessor's creditors, that he should be liable to pay his father's debt *eo ipso* that he possesseth his heritage: and that it shall not be enough to liberate him, that he shows he has acquired it *ex titulo singulari*, since that but palliates fraud; for, if he bought it at the full avail, then he might as well employ his money, and purchase other land; and his affection to his predecessor's ancient inheritance to preserve it in the family (which is oft assigned as the cause,) ought not to preponder the public good of the nation, and to be a *pallium iniquitatis*. And though the 62d Act, *Parl.* 1661, allows creditors to redeem such estates from apparent heirs, within ten years after the acquisition, upon payment of the true sums they gave for it, yet the difficulty of probation renders this almost impracticable, since the creditors from whom the apparent heir bought the apprising or other right, may be dead, and the apparent heir's oath is not always to be credited in such concerns. *Vol. I. Page* 3.

Anent a Register for Redemptions, &c.

It seems to be a great defect in our law, and in our securities, (which yet excel those of England,)—1*mo*, That we have no register for instruments of redemption; 2*do*, That there is no register for interruptions of prescriptions. For I suppose I transact with a man who has an expired apprising; I give him the full price, looking on his apprising as what clearly carries the irredeemable right of the lands; yet I find afterwards that, within the legal of seven or ten years, an order of redemption was used, by which I am brought to count and reckon, and found paid by intromission, and what is wanting is offered to me, and I am left to my warrandice against my author. Here is an unavoidable inconvenience, and irremediless as yet in our law, which a public register of such redemptions would obviate. Siclike in buying of land, men crave a forty years' clear progress, and with that think themselves secure, by the grand Act of Prescription 1617; yet what hinders but, within the course of these forty years, there might have been twenty interruptions used; so that, when he comes to clothe himself with prescription, he finds himself loose; and yet no care nor human prudence could obviate and foresee this. A record would do. And the Act 1699, ordaining interruptions to be renewed once each seven years, is not a large enough plaister for this sore. And the pretence that the lieges are too much overburdened already with the expenses of registration, deserves no answer: only let him who falls in the snare tell what he would have given that such deeds had been *in publica custodia*, and ordained, *ex necessitate*, to be registrate. *Vol. I. Page* 4.

Anent Recognition.

Where there is a feu *cum maritagio*, (as Craig says there are in Strathern sundry such feus, p. 296,) the alienating the whole or major part, without the superior's consent, will not infer recognition, because that makes it not a ward holding, in which only, *ex natura rei*, recognition takes place; unless the charter bear an express clause, prohibiting base alienations without the superior's

consent: as I have seen some of them do, and particularly the feu of the west mill of Kirkaldie. *Vol. I. Page* 4.

ANENT WARRANDICE INFEFTMENTS ON WARD-LANDS.

A warrandice infeftment on ward-lands, in valuation of a marriage, in other lands, is estimated as a burden affecting them, only conform to the value and quantity of the distress or eviction, and no further; or when it has not as yet existed, according to the probable appearance of hazard, it may be valued at two or three years' purchase. *Vol. I. Page* 4.

ANENT ASSIGNATIONS by EXECUTORS.

An executor, before he obtains sentence against the defunct's debtors, or else get the security renewed in his own name, cannot assign debts; yet if he assign, and the assignee pursuing, that be objected to him, I think the executor's concourse with the assignee, offered by way of reply, will be sufficient to sustain process at the assignee's instance, albeit the executor's name be not contained in the summons, nor the defender cited at his instance.
Vol. I. Page 4.

ANENT the FREEDOM of UNIVERSITIES from EXCISE.

THE University of St Andrew's claim to be free from paying excise for all drink furnished to the scholars, and that upon the general privilege competent to all universities, by custom. I remember we enjoyed that privilege at Leyden, after our immatriculation; yet the —— Act 1661, imposing the annuity and excise, ordains all brewers to pay it, without excepting what shall be used by students in universities. *Vol. I. Page* 4.

1678. *June* 19. AGNES WILKIE *against* MORRISON; and

1678. *June* 20. SIR ANDREW DICK *against* ——————.

WHERE arrestments upon dependencies were loosed, upon finding insufficient caution, if a bill had been given in by the party wronged, showing the irresponsality of the caution found, the Lords were wont always, in six or seven several cases, since the King's restoration occurring, to annul the letters loosing the arrestment, aye till more sufficient caution were found. Yet, on the 19th of June 1678, between Agnes Wilkie and Morrison, and on the 20th of June 1678, in a case of Sir Andrew Dick's, the Lords declined to meddle, pretending they would not annul the King's signet letters; but the party grieved had his action *in subsidium* against the clerk to the bills, if the caution was insufficient. And the President affirmed all the other instances were wrong decided: yet they seem very favourable, if not just. *Vol. I. Page* 5.

1678. *June* 21. WATSON of EDERNIE *against* WILLIAMSON.

THE Lords, in Watson of Edernie's case against Williamson, were dissatisfied that the commission for the plantation of churches meddled with valuing the price of ministers' manses, and recommended to the President to acquaint them it was not within the four nooks of their commission. Some called this a derogating from and encroaching upon a committee of Parliament, such as the commission; yet they have no more of the Parliament's power than precisely what is delegated to them. *Vol. I. Page* 4.

ANENT a DISPOSITION by a WIFE.

THIR two points being reported to the Lords, they thought them worthy to ordain them to be heard *in præsentia;* they are as follows, *viz.*:

A woman, infeft in lands, dispones them without her husband's consent: whereon the right so given by her is quarrelled as null.

ALLEGED,—The husband, by a writ under his hand, had given her a power and license to dispone them by herself alone. ANSWERED,—That he could not do, for he is curator to his wife; and that is as if a tutor or curator should empower his minor to alienate his lands without his consent. See Balfour's *Prac. tit. Husb. & Wife, c.* 15; Stair, *tit.* 4. *Vol. I. Page* 4.

ANENT SALE.

A HORSE is sold, having a disease upon him the time of sale: (the same will hold in any other thing that falls under commerce:) *Quær.* if the buyer come to know it, whether he can offer it back, *actione redhibitoria*, within forty or sixty days; or if he must immediately offer it back, so soon as he knows the vitiosity, else will be secluded both from the *redhibitoria et quanti minoris*, on the *edictum ædilitium.* See some observes from the Roman law, in the beginning of another MS. *ch.* 14, *de Edicto ædilitio*, and the cases there mentioned.

ANENT WITNESSES.

BY the English law, no witnesses are examined upon oath against the King's interest, even though they be led by pannels to prove their defences. But the witnesses' declaration is allenarly taken by the judge, who makes of it whatever he pleases. *Vol. I. Page* 5.

ANENT FORFEITURES.

THE case of forfeitures with us is very hard; and by it many loyal and innocent people come to suffer; and I think their exorbitancy should be hemmed in: and particularly all money due to hospitals or other pious uses (such as the debt owing by Argyle to Heriot's hospital, which now falls upon Errol and Kinghorn, his cautioners, without all hope of relief,) should be salved out of forfeitures; as they are exemed from bearing burden by the Act of Parliament 1633, where money is assessed.

This ridiculous clause was found in a certain contract, that the party observer, or willing to fulfil, should pay one thousand merks to the failyier.

Anent Oath *de Calumnia*.

Since it may be craved *in quavis parte processus*, it may also be sought after the decreet is pronounced. I think either the pursuer or defender may seek it before the decreet is extracted, at any time; and if the party in whose favours the decreet is pronounced, refuse to give it, he loses the cause; but, after extracting, it cannot be sought, because it is competent and omitted.

Anent Teinds.

None can pursue for valuation of teinds, but only heritors and liferenters, by the Acts of Parliament 1633, and sincesyne. Hence rentallers, tenants, and tacksmen, (though for never so many nineteen years,) cannot. *Vid.* Durie, *8th March* 1639, *L. of Hesleside.* *Vol. I. Page 5.*

Sir George Lockhart *against* Hopeton.

This question occurred between Sir George Lockhart and Hopeton, who had bought Abercorn from Sir Walter Seton. Where a bond is a part of the price of the land, and narrates it to be so, and bears a simple obligement for payment, *quær.* if any of that money can be retained by the debtor, buyer of the land, upon the account of clear and liquid encumbrances, inhibitions, &c. which he knew not of when he gave the bond. Sir G. Lockhart contended it could not, since the bond was simple and pure, and is not payable to the seller, (which would much alter the case,) but to a creditor, who has a *jus quæsitum*, and is not concerned to purge with his money, which has now altered its nature, and cannot be more looked upon as the price of land; and the buyer should have searched for these encumbrances, *et sic caveat emptor*. Yet it seems very natural that the price of land should purge real burdens on it, and stand affected to that end. *Vol. I. Page 5.*

Anent Liferent.

A wife is infeft in the liferent of land, with the pertinents. *Quær.* if she may cut planting, if it be only for repairing tenants' houses upon the ground. If it be a forest, or such a wood as the law calls *sylva cædua*, she may. See Craig, p. 189, *et l.* 9 *D. de Usufr.*; but, if it be only policy or planting for decoration about a house, it seems hard to permit that devastation, though it be profitably bestowed, and converted to the good and utility of the fiar. Yet I hear that, this Session, the Lords found a liferentrix might cut trees for necessary uses. *Quær.* if a wadsetter may do as much. I think he may. Yet Craig, p. 214, tells how a vassal was quarrelled by the superior, as having amitted the feu, for cutting the great trees that were on the ground. *Vol. I. Page 5.*

Anent Redemption.

A father dispones lands to his son, redeemable on the payment of a rose noble. The son dies before the father, and no order is used, but the father contracts debt after that disposition. *Quær.* if the contracting of that debt be equivalent to an order, or will give the creditors a right to redeem; and if that personal faculty of the father's may be transmitted, by apprising or other legal diligence, to his creditors. See Dury, *12th July* 1631, *Huttonhall;* and Stair, *20th November* 1661, *Fleeming.*

Alienatio rei legatæ is in some cases reputed to be *ademptio legati.* § 12. *Inst. de Legatis.* *Vol. I. Page* 6.

Anent Succession in Conquest.

One who had conquest lands dies without children, and without brother or sister; his nearest heirs are three father-brothers, who were all younger than his father was. *Quær.* to which of the three will the conquest ascend. Sir George Lockhart resolved that it would go to the eldest of the three.

A man, who had conquest lands, dies, leaving behind him a consanguinean brother elder than himself, and a brother-german younger than himself. *Quær.* to whom will the conquest fall? Sir G. Lockhart affirmed it would not in this case ascend, but descend; because the brother-german, in all succession, is ever preferred to that brother who is only attingent by one side; so that the rule of ascending must be ever understood *positis terminis habilibus, et in eadem linea* of propinquity. See the case debated betwixt *Oliphant* and *King*, in Craig, p. 245.

Anent *Beneficium Discussionis.*

The discussion of the heir of line, before the heirs-male or of tailyie, is not satisfied by an unextracted decreet against the heir of line; but if any estate to which he can have right be condescended on, that must be affected and discussed first. Yet sometimes the Lords will decern against both heirs, superseding execution against the other heirs, till the lineal heir be first discussed; which is just. For this is no more but to constitute the debt against all.

Anent Substitution.

A minor having got an assignation to a sum of money, with this quality, that, if he die before majority, then the same shall belong to the heirs or executors of Titius, who was then dead when the assignation was granted,—the minor dies before he attains his perfect age; *Quær.* how Titius' heirs and executors shall establish the right of that sum in their person. Sir G. Lockhart thought they might do it by serving themselves heirs to Titius, or confirming executor. But Titius himself had never right to this sum, it was never *in ejus bonis;* and the sum needed not be confirmed; and this would make them liable for Titius his debt: so that, in case there were fear of his debt, then a summons might be raised, to hear and see that he, as nearest of blood, and the person who might

be heir or executor to Titius, had right to that money. And here a retouring the blood would do the turn. *Vol. I. Page* 6.

Anent Tutors.

It is inquired when a tutor or curator is liable for the annualrent of their pupil's annualrents. It is thought not till a year after the expiration of their office, and then they become accountable for the interest of their pupil's or minor's money. But what is the true *laxamentum temporis* here, see it more accurately distinguished in another MS. *Vol. I. Page* 6.

Anent Conjunct Right.

Where a sum is conceived payable to a man and his wife, and to the longest liver of the two in conjunct fee, *Quær.* if the wife surviving can seek the principal, or has only right to the liferent and to the annual; and if it be provided to their heirs and assignees, if it should be divided between the man and the wife's heirs equally. They say, if it be provided by an heritable security, then *sexus masculinus prævalet*; but if it be a moveable debt, then the wife has right to the fee thereof, if she survive; and if they be both dead, then it divides equally between their heirs. See Haddington's *Prac. 10th of November* 1609, the *Goodman of Carberry* and *Bartilmo Tulloch*; and Stair, *tit. 27.*

Anent Regality.

Some affirm, that inhabitants within a regality cannot decline the Sheriff-court, upon the pretence that they dwell within regality; since the sheriff is the King's lieutenant, and the lord of regality has only power to repledge.

1676, 1677, *and* 1678. Henderson of Fordell *against* Monteith of Caribber.

1676. *December 5.*—Fordell Henderson, as heir of tailyie to Monteith of Randifoord, obtained, at Secret-Council, the charter-kist to be given up to him, and Monteith of Carybber to be dispossessed, and himself put in possession; because the beginning of Carybber's possession was precarious, as a factor, and the disposition by which he acclaimed the estate was suspected of falsehood, and improbation of it depending before the Lords of Session. It was wondered how the Council could find this a competent business for them, it neither being a riot nor *metus majoris tumultus*, but merely civil. When the improbation came to be tried in February 1677, there being only two subscribing witnesses in the disposition, one of them, who had been Randyford's servant, and who was mightily suspected to be bribed, disowned his subscription; which tells us that frequent error of taking the subscriber's own men-servants or sons, to be witnesses in the writs granted by them. Mr George Norvell ever advised that writs, especially if of moment, should be subscribed before famous and honest

witnesses; and yet it is little looked to. Which draws many writs in hazard, mean fellows being easily corrupted to deny their subscriptions.

Advocates' MS. No. 513, folio 267.

1677. *November* 8.- We have showed *supra*, No. 513, 5th December 1676, that, in the improbation raised by Fordell against Carybber, of the disposition made by Randifurd to Carybber, one of the subscribing witnesses to the disposition, whose name was Cumming, had, upon oath, denied and disowned the same. Thereafter, one Alvas, servitor to Mr Robert Colt, advocate, was dealing with the said Cuming, the witness, to pass from his first disposition, and to acknowledge the subscription; and thereupon drew up the draught of a bill, which he desired him to subscribe, and give in to the Lords. It bore, that he had been practised and influenced to deny his subscription; and therefore craved the Lords would allow him to mend his former deposition. He desired some time to advise upon the bill, and kept it till the Session met, and then gave in a bill showing how he had been dealt with (suborned) to resile from his former testimony; and gave in the draught he had received from Alvas. However, there being great presumptions against him of his prevarication, both he and Alvas are confronted. Alvas denies, at least says he gave him warrant to draw that bill; the other asserted the contrary. The Lords sent them both to prison. At last they were bailed and let out, upon caution to reproduce them, when called for, under the pain of 1000 merks.

Caribber has raised a summons of astruction of his disposition from Randifurd, upon missive letters written by Randifurd to him, showing he would leave him his estate. This is a new sort of summons. *Item, quæritur* if one's first deposition is more to be trusted, or his retractory one. See thir parties, *infra*, No. 708. See the decision of this cause, where Caribber gains it, at the 9th of July 1678, [below.] See *Lanfrancus Balbus, Decisione* 509; *Julius Clarus, in Praxi Criminali, quæstione* 53, § *finalis, per totum*, where he shows it is *communis opinio*, if a witness contradict his first deposition, *statur priori examini seu depositioni.*

The Lords, in another case, have ordained this point to be debated in their own presence,—How far a witness, *ex intervallo*, (for *incontinenti* he may,) may seek to rectify and alter his deposition, to the prejudice of him in whose favours he deponed formerly, to whom there is a *jus quæsitum*, which ought not to be taken away from him without his own consent; *L.* 11 *D. de Regulis Juris;* and whether the first or second deposition is most prevalent; and if the second derogates, as in laws, testaments, contracts, &c. See *Cavalcanus de Testibus.* For a reprobator, it does not always convel the testimonies to this effect, to rescind the decreet founded on those testimonies, as its probation. See Mackeinzie's Pleadings, *Sir John Whytfoord of Milneton* and *the Lady.*

Advocates' MS. No. 650, § 6, *folio* 305.

1678. *January* 12.—Monteath of Caribber and his son are pannelled before the Criminal Court, by Henderson of Fordell, (see of this, *supra*, [No. 650,] *sect.* 6.) for suborning Cuming, by the aid of one Alves, to depone falsely. The Justices laid it over till the civil prejudicial action betwixt them, depending before the Lords, were discussed. *Advocates' MS. No.* 708, *folio* 316.

July 9.—The Lords advised the improbation pursued by Fordell Henderson, against Monteith of Caribber, of the disposition made by Randiford, of his estate to Caribber. (See 8th November 1677.) The Lords assoilyied from falsehood, and sustained the disposition, and found it probative, unless Fordell would offer to prove, that, at the time of Randiford's death, it was an undelivered evident,

and lying among his papers; for it contained no clause dispensing with the not delivery. Fordell was so confident, that he hoped the Lords would find the disposition false, upon Cumming denying his subscription; (but the Lords were persuaded that Cumming did prevaricate;) and the least he promised himself was that it should be found a writ null of the law, as only standing upon the testimony of a single witness. This made him bestow very liberally; which he was the better enabled to do, that the Secret Council had given him the possession *medio tempore;* and the Lords had not ordained any restitution of the bygone fruits, reputing them as *bona fide percepti et consumpti*, on the Council's warrant. This interlocutor surprised many as unexpected. See the full case in the Informations. *Vol. I. Page* 6.

1676 and 1678. CATHARINE MITCHELL *against* THOMAS LITLEJOHNE'S HEIRS.

1676. *June* 17.—CATHARINE Mitchell, relict of John Reid, merchant in Edinburgh, being remarried to Thomas Litlejohne, tailor; who, within half a year, taking sickness, he grants her a bond and declaration for 600 merks, during her lifetime, in case the marriage dissolve within year and day. He dying shortly after, the said Thomas his heir, and other children, with concourse of Andrew Litlejohne, their tutor, pursue a reduction, before the Lords, of this her yearly liferent provision: 1*mo*, Because as he died within the year, and so no jointure was of the law due, so the said declaration and bond, dispensing with the said law and consuetude, was granted *in lecto ægritudinis;* and though he came to kirk and market, yet he was supported; and was sick of a lethargy, and was not *compos mentis*, neither as to memory, nor judgment, nor bodily health, when he did it. 2*do*, It was *a non habente potestatem:* he could not do it in defraud of his children of the first marriage, who were anterior creditors, by virtue of their mother's contract of marriage, and a clause of conquest therein contained, providing the haill means and estate he should happen to acquire *stante matrimonio* to the bairns to be procreated of that marriage; after which he could make no donation to a conjunct person, destitute of all onerous cause, in prejudice of these children their *jus quæsitum.*

ANSWERED to the *first*,—Offers to prove he was *in liege poustie*, when he subscribed it, and sound in his intellectual faculties, and that he came to kirk and market unsupported. As to the *second*, A naked clause of conquest does not hinder nor restrain a father from disposing on a moderate jointure to a wife who brought somewhat with her; he being of an opulent fortune, and not incapacitated by inhibition, or other diligence done upon that clause of conquest.

The Lords, before answer, ordained both parties, *hinc inde*, to prove, both as to the defunct's going to kirk and market supported or unsupported, and as to his capacity and understanding what he was then doing. For this, *vide supra*, 20*th February* 1670, the *Lord Balmerinoch* against the *Earl of Airly* and *Lady Coupar*, and the many citations there. *Item*, 11*th July* 1669, *Shaw* against *Calderwood.*

When the probation came to be advised, in regard the supportation was mentioned by some of the witnesses, and the acts of sanity were not so fully proven,

therefore we alleged for the said Catharine, defender,—That her interest was well founded to affect, if not the heir, (to whose prejudice nothing can be validly done upon deathbed,) at least the executors and the moveable estate of the granter, which was here of a value far more considerable than her annuity amounted to; as was found, *supra*, in a case, at number 260, in November 1671; and in the places marked *in margine* there, and ofttimes *alibi*. And that her bond of provision behoved, at least, to sustain, as being of the nature of a legacy, to affect the moveables; as was decided, 13*th January* 1631, *Houston* against *Houston*.

To this it was ANSWERED for the pursuer,—If the husband, granter of this bond and annuity, had not been denuded by that obligement to provide the conquest to the children of the first marriage, they would not deny but this provision would be good and effectual against the dead's part of the testament and executry; but, since his estate was so destinate, he could not wrong that *jus quæsitum*, especially by profuse squanderings and unnecessary donations.

To which it was REPLIED,—That the fee of the conquest (notwithstanding of a clause of simple destination in favours of the children of a first marriage,) must undoubtedly reside in the father, and so carry about with it its congenial effect, viz. *jus de re sua libere disponendi*, for the personal obligement cannot give *jus in re*. *L.* 20 *C. de Pactis,—Traditionibus, non nudis pactis, &c.* 2*do*, These clauses of conquest cannot divest the father of the dominion of his acquired goods, else he could not alienate them to strangers, which he may do; *ergo*, he may moderately provide a wife furth of these goods, being a most favourable and onerous case in law. 3*tio*, If they enstated the property of the conquest in the children, what needed inhibitions be requisite to secure and consummate such clauses? 4*to*, Though they were creditors thereby, yet that hinders not the father, their debtor, to dispose on his goods till he be incapacitated by diligence; whereof there was none there. (See the three several ways of conceiving clauses and destinations of conquest in contracts matrimonial to children of the marriage, and their sundry effects in law, in a MS. beside me.) 5*to*, If such clauses impeded the father's power of disposal of the conquest in a rational way, then, among many other inconveniences, it should hinder him from a second marriage: it opens a door of encouragement to profligate debauched children to be disobedient and contemn their parents, if they know their parents are restrained from doing any thing in their prejudice. See this and all the other grounds, *ad saturam*, enlarged in the information of the cause beside me; to which I refer, touching here the heads of the arguments only. 6*to*, The Roman law is clear in *L.* 15 *C. de Pactis*; and see anent it, Sandes, *Decisiones*, p. 71, 72, and 75; *L.* 6 *C. de secundis Nuptiis*: by which, in an equable sort of temperament, a man is permitted to give as much for a provision to a second wife as the smallest portion of any of the children of the first bed comes to. 7*mo*, The law of England is clear also; see Bracton and Swinebourne, cited in the afore-mentioned information. 8*vo*, Our Scots law goes along; so Craig, p. 238, *et seq.* in the case of the three Aikman Sisters; see M'Keinzies's Observes on the Act of Bankrupts, p. 73 *et seq.* *Novellam Leonis*, 19; *vide supra, num.* 262, [18*th November* 1671.] See the places in Durie, Stairs, and many other enforcements, argued in the foresaid information; and also a short one drawn by Sir Jo. Cunyghame. *Vide supra*, Calander and Dumferling's case, [No. 445, *February* 1674;] and 1*st of December* 1680, *A. Bruce*.

The Lords, on the 26th of June 1676, having advised this debate, found very rationally that an obligement in a first contract of marriage, providing all the conquest during the standing of that marriage to the children procreated thereof, does not so denude the father of the propriety, or instate the children in the fee and dominion of the conquest, but, *1mo*, notwithstanding thereof, the father may freely dispone upon it to his creditors or others, for onerous causes. See 15th June 1678, *Birnies and Morray*; 1st Dec. 1680, *Anderson* and *Bruce*. *2do*, He may, *non-obstante* such a clause, give away money he has beside him in specie to any he pleases, so that the same can never be condicted or repeated by the children. See Dury, 6th July 1630, *Monro and Scot*, where the giving of a legacy out of one's own hand makes it so privileged that it does not suffer the *detractio falcidia*. *Vide supra, num.* 422, [Pallat and others, November 1673.] *3tio*, That destination of the conquest does not hinder but a man may, in a rational way and for a just cause, (though it be not onerous nor adequate to the worth,) leave in legacy, or otherwise dispose upon a part of the said conquest to any person they please, though it were even *titulo donationis*; *si modo rationalis subsit causa* why he should gift to that person, *obligatione morali vel naturali, ad antidcora*, or the like; and that it is not a profuse squandering away of his means or a fradulent conveyance. *4to*, They found a clause of conquest did not impede a man, in a rational way, to provide his wife to a competent liferent; providing it be *moderata* and not *inofficiosa donatio*; not exceeding the half of his free moveable gear, if he want children, or a third part of his moveable and personal estate, falling under testament confirmation and executry, if he have children; upon which third, or dead's part, he hath power allenarly to legate in prejudice of his children: unless inhibition or other legal diligence were done or served against him, upon that clause of conquest by the friends at whose instance execution was ordained to pass by the contract matrimonial; or that the said clause of conquest be conceived, not by way of simple and naked destination, but thus,—Likeas, I bind and oblige me to take and provide the haill conquest to be made by me during the marriage, to the heirs and bairns procreated therein; or if, besides thir *verba de presenti*, it bear farther a clause and obligement *de non alienando*. Some complained of this decision, as too like a trysting and gratifying interlocutor, as not so close to the buckle and the principles and analogy of law. See Dury, 15th March 1634, *Brown*. And it does exceedingly evacuate, enervate, and insignificate clauses of conquest in contracts matrimonial. But what made it tolerable here, was, that the wife was no otherwise provided but by this 600 merks; for, if she had reaped any other benefit from her husband *aliunde*, it is like they had not used her so favourably. *Infra*, December 1676, *numero* 524, thir same parties. See all thir formulas *loco supra citato*. Concerning the import of obligations natural, civil, or mixed; and of pactions, *sive sint nuda pacta sive vestita, sive sint legitima, et contractibus incontinenti adjecta sive ex intervallo*; see *Vinnius ad Titulum Institut. in princ. et parag. 2, De Obligationibus.*

It may be alleged if the third part of the free moveables be less than the stock of 10,000 merks, which corresponds to 600 merks by year, the principal, so long as it lasts, should be liable to her for making up the deficiency of her liferent; yet the interlocutor provides her only to the liferent of the third part.

At the pronouncing of this interlocutor, the pursuers' procurators contended, That, since it appeared the motive of it was the great moveable estate the de-

funct had left behind him; for taking off whereof, they offered to prove that it would not amount to 40,000 merks of free gear; whereas it has been represented to be 80,000 merks. The President declared, the quantity of the patrimony was no inducement to them; but, though he had only left 30,000 merks, she behoved to have her annuity out of the third part of that 30,000 merks; and therefore ordained and assigned a day for both parties to condescend upon his estate,—the defender on the value of it at the time of her husband's decease, and the pursuers on the defalcations by debts, desperate counts, bonds, or otherwise. Which being done on either hand, and the pursuer, for himself, and in name and behalf of his pupils, offering to assign her to as much of the count-book (for there is 22,000 merks owing by accounts,) as would make up a stock of 10,000 merks, to pay her her annuity of 600 merks, she finding caution to do exact diligence against the debtors in these counts, should be assigned to her, and refund the stock at her death.—*Vide infra, February* 1677, No. 549, *Sarah Roome.*

Against which, it was ALLEGED,—1*mo*, That her provision behoved to affect not the third part only of her husband's free executry, but the half; because, the marriage dissolving within year and day, this legacy was not given to her, nor adjudged to be payable out of the moveables, as wife, (for the marriage is *fictione juris*, as if it never had existed,) but as if she were a stranger, and nowise in place of the third of the moveables due to her as wife; for, if there had been no marriage, then the testament had admitted a bipartite and not a tripartite division: now the case, by the dissolution within the year, is, *constructione et præsumptione juris*, just as if he had not had a wife; *ergo* the testament must divide in two. As to the tutor's offer, *nullo modo relevat*, and she is not obliged to accept of it, because there is clear liquid responsal debt for satisfying her obligation; and the tutor has had two years time for doing diligence, (and six month is but the *laxamentum* allowed in the Roman law, *L.* 15 *D. de Administratione Tutorum,)* and for recovery of the debts; and her case is alimentary and privileged, &c. See the information about thir two points beside me.

Craigie, having reported this, affirmed, That the Lords repelled the first, and adhered to their former interlocutor, and permitted it only (being *moderata et gratuita donatio,)* to be taken off the third of the moveables; and, as to the second, they ordained the haill moveable estate of the defunct to be casten, proportioned, and divided into three equal parts, as near as could, and gave the defender her option and election, to betake herself to any one of them she expected would be readiest penny to her. But, first, we of consent defaulked, and allowed the tenements of land, wadsets, and heritable bonds granted to heirs and assignees, secluding executors, (conform to the Act of Parliament in 1641, renewed by the 32d Act in 1661; see anent this, other papers *alibi*;) many of which they had foolishly and ignorantly confirmed, though they fell nowise under executry. As for the legacies, we contended her right was preferable, at least that she ought to come in *pari passu* with them.

And, in regard the action could not be brought to a period in the summer Session 1676, and that she wanted two years of her annuity, through their contentious prolonging of the plea, Craigie, on the 28th July, ordained her to have 600 merks paid by the tutor within a month, *nomine alimenti, ad sumptus litis sustinendos, provisionaliter; per legem 27, par.* 30, *D. de Inofficioso Testa-*

mento; *ibique Bartolum*; *L.* 14 *D. Ut in possessionem Legatorum*; *L. ult. C. de Ordine Cognitionum. Vide Alvarum Valascum, Consultatione* 1*ma*, where he treats *de Alimentis quæ unus ex litigantibus, ob paupertatem, petit in judicio sibi ministrari ab altero ex litigantibus, qui res de quarum dominio contenditur possidet*; and shows that, in Spain, *extra casum dictæ legis* 27, *Nunquam pauperi litiganti ministrantur sumptus.* See *Matthæus de Afflictis, Decisione* 10 *et* 11; *Curtius, in tractatu de Sequestris, in fine.* See, where I find the Lords of Session did the like, *ex officio nobili*, in the Sederunt books, (see my summary of them,) 13*th* of *February* 1560. In an action between the *Lady Allardize* and *Wm. Stewart*, they ordain Wm. to pay her the sum of in the mean time, till the plea betwixt them shall come to a close; *ibique citatur lex* 7 *D. de agnoscendis et alendis Liberis.*

When this 600 merks fell due, Andrew Litlejohne, the tutor, presented a bill of suspension thereof, to my Lord Newbyth, who was Ordinary that week for the Bills, upon this reason, That the eldest son and apparent heir being past fourteen, and so out of tutory, had deserted him, and was intending to elect Mr Wm. Clerk, his uncle by the mother, for his curator, and who thereupon was arresting all the sums of money with which he resolved to pay this 600 merks decerned; so that the debtors would not own him, but retained in their own hands, and were offering to suspend upon double poinding. Though this pretence was no way relevant; for, 1*mo*, The heir had nothing to do with the executry, unless he would offer *collationem bonorum.* 2*do*, The tutor had already uplifted, intromitted, and meddled with ten times the sum decerned. Yet Newbyth superseded execution till the 8th of November, at which time they might discuss the reasons of suspension upon the bill before the Ordinary, the tutor always within a month paying her 300 merks of the 600 merks decerned for.

In this my Lord did not punctually observe the injunctions of the Act of Sederunt dated the 9th of February 1675, commanding irrelevant bills to be instantly rejected; but I mind not to rip up his irregularities.

Advocates' MS. No. 478, *folio* 246.

1676. *December* 14.—In the action mentioned *supra*, *num.* 478, by Catharine Mitchell, relict of Thomas Litlejohne, against his children and tutors, conform to the interlocutor of the 17th of June last, she having given in her charge, containing an inventory of her husband's personal and moveable estate, out of which she was found to have right to a third, in so far as extended to 10,000 merks or 600 merks per annum; they craved defalcation of heritable bonds: which was granted. 2*do*, Of debts owing by the defunct. Against this we ALLEGED,—No respect can be had thereto, because not instructed. ANSWERED,—They are not masters of the instructions; and therefore crave an incident against the creditors, to cause them exhibit their bonds. REPLIED,—That delays the pursuer, and therefore the relict offers to find caution (somewhat like the *cautio Mutiana* in the Roman law, but not the same case with it;) that what debts shall be afterwards lawfully instructed, and she called thereto, shall proportionally deduct off her third part, with the other two parts; providing always, in case her stock diminish, so as it cannot afford her annuity of 600 merks per annum, then the fee of the third part shall be liable for the inlaik. My Lord Craigie granted them an Act for calling the creditors to produce their bonds.

Then ALLEGED,—The younger children having got bonds of provision from their father, to the value of 30,000 merks and more, and being creditors *ab ante*, both by their mother's contract-matrimonial and clause of conquest therein contained, as by their legitim and portion natural, and confirmed executors *qua* creditors to their father; they are preferable to his relict; whose provision is without any cause onerous, *in lecto, et intra annum.* ANSWERED,—This is determined already, and the relict preferred, by the interlocutor of the 17th of June last.

This going to the Lords' answer, and being reported by the Justice Clerk, and they having considered the debate, the bonds of provision made to the relict and children, and legacy left to Andrew Litlejohne, together with the defunct's testament,—they found the provision made to the relict preferable both to the provision made in favours of the children, and to the legacy left to Andrew Litlejohne the tutor; and that in so far as concerns the third part of the defunct's moveable goods and debts: as also, that the bond of provision, granted to the children, is preferable to the legacy left to Andrew Litlejohne; but prejudice always to the said Andrew, to found upon any declaration in his favours, contained in the codicil, and to pursue thereupon. And find the foresaid provision, granted to the relict, preferable in so far as it may be satisfied out of the third part, whether the same was granted on death-bed or not. Which is no more but a farther confirmation of what they had found formerly on the 17th of June last. See the information, which has sundry other points in it.

Thereafter the tutor, Andrew Litlejohne, having, in name of the children, obtained a decreet against sundry persons, debtors, the relict, on the 4th of January 1677, gave in a petition to the Lords, founding on her interest in a third part by their reiterated interlocutor; and therefore craved either the decreet might be stopped, or the third part of the sums therein contained declared to belong to her *pro tanto*, or that sufficient caution were found her for making forthcoming to her a proportional third part thereof. But the Lords having allowed him to extract his decreet, in regard he offered immediately, without a process or other formality and delay, to count and reckon, either to Mr Wm. Clerk, as now curator, chosen by the eldest son and apparent heir, or to the relict: whereupon I advised her to arrest such of these sums as were in persons' hands who lived within Edinburgh, by virtue of the letters of horning, poinding, and arrestment, raised on her decreet obtained before the Commissaries of Edinburgh, whereof there was no past suspension, but only reduction depending.

Upon the tutor's offer to count, Mr Wm. Clerk, joining with the relict, offered some proposals that he might have right to intromit, finding caution to pay the children's portions; since the eldest son, by the father's testament, was nominated sole executor, and all was disponed to him, with the burden of his brethren and sisters' provisions; especially since he offered to secure the relict out of the first and readiest, and that he had already intented a process for removing the tutor, as suspect, and grossly malversing: and therefore craved that all the bonds, tickets, counts, and other papers, might be consigned in the clerk's hands. This the Lords would not grant; but ordained them to count and reckon before Reidfurd. See the proposals *apud* me. *Vide infra, 7th July 1677, num.* 596.

After the tutor had run both the terms of his incident against the creditors, for production of their bonds, to instruct what was their respective true debts, and that the term was circumduced and certification granted, then they dropped in bonds to the value of 6 or 7,000 merks, but sundry of them such against which there may be very just exceptions; but, even allowing that entire article, the relict from the remanent may easily find a stock of 10,000 merks, to pay her annuity. She also gave her oath of calumny anent her knowledge of the debts. *Advocates' MS. No. 524, folio 270.*

1677. *July* 7.—In the action pursued by Catharine Mitchell against the children of Thomas Litlejohne, and their tutors and curators, largely deduced *supra, num.* 478 *and* 524; (*vide infra, num.* 599;) the said relict having given in a bill to the Lords, craving now she might have the extract of her decreet for her annuity of 600 merks, bygone and in time coming; since the tutors and curators, who were appointed in February last to close their count and reckoning betwixt and the 1st of June, had not done it, but colluded of purpose; and she could not attend their uncertain motions:

The Lords ordained the other party to see and answer; who, returning none, the Lords' deliverance, this day, was,—That they having considered her bill, and that no answer is made thereto, they do ordain the children of the deceased T. Litlejohne, and their tutors and curators, to make payment to the petitioner of the sum of 600 merks yearly, for all the years resting to her, conform to their former interlocutors, and, in time coming, during her lifetime; and to find sufficient caution for securing her therein, and making payment to her thereof in all time coming.

The tutors and curators, being startled at this, and particularly their finding caution, gave in a bill to the Lords, pretending their count was near ended, and they could not know what her share would be till it were finally closed, &c.

The Lords, on this bill, on the 12th of July, by their deliverance, adhered to their former interlocutor in favour of Catharine Mitchell, superseding extract of any Act or decreet upon that interlocutor till the 26th of July next; to the effect, *medio tempore*, the count might be closed betwixt the tutor and curator, and the Lords may then consider if any thing then ought to be deduced off the sum of 600 merks, ordained to be paid to the said Catharine. The 26th of July elapsing, and they intending nothing but delays, she extracted her decreet; and, having charged them with horning, they presented a bill of suspension in August, made up of false or frivolous reasons. However, she did stop execution upon her decreet of consent till the 20th of November; and they paid her 900 merks of bygones, the one half on the 1st of September, and the other on the 1st of October. See my answers to their last bill of suspension.

Advocates' MS. No. 596, folio 292.

1678. *February* 17.—In the action mentioned *supra*, [No. 596,] pursued by Catharine Mitchell against Litlejohnes, we insisting to get the bill of suspension discussed, and my Lord Reidfurd having reported to the Lords the state of the count betwixt the tutors and curators, and her objections against the same, *viz.* that [she,] as relict and creditrix, by her contract of marriage and bond relative thereto, could never be made liable to bear any proportional part of the expense of the confirmation of the testament, especially since the Lords had found she had right to a free third for satisfying her liferent; and that they had not confirmed the testament testamentar, which ratified her right, but a

dative, with design to defraud her; *item* that she could bear no part of the aliment or entertainment of the children, or of the expense of the lawsuits, much of it being most exorbitantly depursed in pleaing against herself: so that nothing could affect her third as a burden, but only debts. And, in case it would not pay her, when it is stocked, 600 merks yearly, we craved access to the stock, for making up our deficiency and inlaik, upon the *cautio Mutiana*.

The Lords having heard the Lord Reidfurd report the debate in this cause, they found that the expenses of confirmation, and the children's aliment till the next term after the father's decease, and the necessary expenses dispursed in law pursuits against the defunct's debtors, ought to be deduced off the total of the inventary; and that all the other accounts behoved to come off the bairns' two parts, and nowise diminish any part of the relict's third; but found, in case there should be any inlaik of the said Catharine Mitchell, the relict, her annualrent of 600 merks yearly provided to her, they reserve to her action for the same as accords of law. This the Lords thought safer than to decide *in jure*, upon a supposition of the deficiency of the third part to pay her, which, *ex eventu*, might not exist.

See more of this cause, on the 10th of July 1678.

Advocates' MS. No. 727, folio 320.

1678. *July* 10. In the action betwixt Katharine Mitchell, and the heirs of Thomas Littlejohn, and their tutors and curators, the Lords (17th Feb. last,) found the entertainment of the family till the next term came off the total of the inventary; whereon a question arose, whether this was Lambmas or Martinmas. The relict ALLEGED, Lambmas, since [her husband] died some days before it. ANSWERED,—Whitsunday and Martinmas were the only legal terms.

The Lords found that it reached to Martinmas, and that the defunct's family ought to have aliment till the term of Martinmas after his decease.

Then it was controverted, what should be allowed for the aliment of each child. The Lords modified £100 Scots yearly, for the aliment of every one of the younger children; and 200 merks Scots for the aliment of the eldest son, because it was within the annualrent of their portions, and within Edinburgh, where all things are dear.

Then Andrew, the tutor, offering to account for the ware as it was appretiated; ALLEGED,—That was only an advice and opinion; and he ought to make no benefit to himself of the pupil's goods, else he acts unfaithfully in his tutorial trust, &c.

This being also reported to the Lords, they found that the tutor ought to depone anent his intromissions with the defunct's goods, as well for the goods that were in his shop, as any other goods; and that he ought to account for the true prices he got for any of the goods that were in the shop, and also for the prices of such other of the said goods as were trusted by him, for which he hath not done exact diligence for recovery of the prices thereof.

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1678. *July* 17. LORD PITMEDDEN *against* ROBERT and WILLIAM PATERSON.

THE double poinding between my Lord Pitmedden and Mr Robert and William Patersons, Regents, was this day decided. The case was a competition between two arrestments, both laid on upon money owing to the late Laird of Cromarty, who killed himself, and due by some merchants in Aberdeen, who had bought Cromarty's bear. Paterson's arrestment was a day or two prior; but it was ALLEGED for my Lord Pitmedden, 1*mo*,—That he had an assignation to the money before their arrestment. 2*do*, Although his arrestment was posterior, yet he ought to be preferred, even upon his arrestment, because the term of payment of the bond whereupon his arrestment proceeded was come and bypast, the time he executed his arrestment; whereas the term of payment of the bond whereupon their arrestment was laid, was not come, much less was it past, at the time the arrestment was executed. ANSWERED,—That the bond whereon their arrestment proceeded, was only a bond of corroboration; and, though its term of payment was not come, yet the term of the bond corroborated was long ago expired. 2*do*, The Lords ordinarily, where intimations or arrestments are near to one another, use to divide the sum arrested, and bring them in equally, and *pari passu*. 3*tio*, Pitmedden had a cautioner for his money, one Urquhart of Newhall, and so he would not lose a farthing, though they were preferred; whereas they had not another imaginable way of payment but by this arrestment; and they were content to pay Pitmedden, if he would assign against cautioner and all. REPLIED, to the 1*st*,—Their diligence is nimious and preposterous. To the 2*d*, He is not to capitulate. To the 3*d*, It were unjust to assign against the cautioner, when he is paid out of the means of the principal debtor.

The Lords found that the posterior arrestment was preferable, wherever the term of payment of the bond whereon it proceeds is past; and in the first arrestment it is not past, albeit the term of the bond corroborated was come; and reserved to the cautioner to be heard why the bond should not be assigned against him.

It was ALLEGED for him, That he was content to satisfy Pitmedden, and so he must not assign against him; which was admitted. This was no new decision; for, on the 29*th of July* 1670, in a case of *Cornelius Neilson* against *Charteris*, the Lords preferred the posterior arrestment, where the term of payment of the bond which was the ground of the arrestment, was past at the time of the laying on of the arrestment; and that, to a prior arrestment proceeding on a bond, the term of payment whereof was not come when the arrestment was used: and that practick has this farther singularity in it, that the term of the first arrester's bond was come and bygone, when they were competing for preference; which specialty the Lords regarded not. See July 1676, and 1st December 1683, *Gartshore*. *Vol. I. Page* 8.

1678. *July* 19. FOTHRINGHAM of POURIE *against* The MARQUIS of DOUGLAS.

IN Pourie Fothringham and the Marquis of Douglas's case, the Lords found the adjudication null, but restricted it to the sums contained in the bonds whereupon it was led. *2do*, In Pourie's cause against Hunter of Burnside, "they found, where a clause irritant (resolving the feu on cessation, *per triennium*, to pay the feu-duty,) is in a charter, and a reduction is raised by the superior for annulling the feu, for [the vassal's] not paying the feu-duty by the space of three years, that the said failyie cannot be purged at the bar; but if the feu or other charter want that resolutive irritant clause, and the declarator only concludes amission of the feu, upon the 246th Act of Parliament 1597, as inherent *de jure et ex natura rei*, the Lords declared they will find that *mora* purgeable at the bar, any time *ante sententiam in declaratoria obtentam.*" *Vol. I. Page* 10.

1678. *July* 20. GEORGE DRUMMOND *against* JAMES DUNBAR, Messenger.

THE Lords having this day advised the process against James Dunbar, messenger, for paying the debt, because he had suffered the Earl of Morton to escape, (*vide* 27th November 1677;) The Lords assoilyied the said James; because George Drummond, the employer, being present with the messenger, did not bring halbardiers, from the town's-guard, to assist the messenger, which he might have done, being within the Town of Edinburgh, and at the cross, so near to the court of guard. *Vol. I. Page* 10.

1678. *July* 24. ANENT the EXAMINATION of an AGENT.

THE Lords ordained an agent to be summarily examined upon a bill, although it was alleged, since the regulations and Act of Parliament 1672, Agent was not *nomen juris*, and so no member of the house, and ought not to be examined but by way of action. *Vol. I. Page* 10.

1678. *July* 24. TAIT *against* ROBERT CAMPBELL.

IN Tait's suspension against Robert Campbell, apothecary, his removing, a practick was alleged to have been decided between Thomas Wilson and Nicol Hardie, who pursued Thomas to remove from a brew-house in 1671: that the Lords superseded the removing till the Martinmas, in respect Thomas had some victual lying in the lofts, which he could not transport conveniently, nor get brewed off till Martinmas. But I saw the decreet, which mentions no such inducement moving the Lords, but only the ambiguity of a minute passed between

the parties. And Tait contended the removing of his wines would spoil them more than the carrying away of malt would have done. Craigie alleged there was an old statute in *Reg. Maj.* anent the giving more timeous warning for removing from cellars than from houses; but he spoke dubitatively of it, and I can find no such act. *Vol. I. Page* 11.

1678. *July* 24. JAMES HAMILTON *against* The EARL of ROXBURGH.

IN the action pursued by James Hamilton, as heritor of the lands of Ninewar, against the Earl of Roxburgh, for buying the teinds from the Earl, as tacksman, or as having right from Maurice Lawder, the first tacksman:

ALLEGED,—They belong to the parsonage of Dumbar, and so cannot be bought.

ANSWERED,—Since the parson was not in possession of them *in anno* 1627, by the King's letter, in May 1634, they may be bought.

The Lords of the Commission for Valuing Teinds inclined to sustain that they might be bought; whereupon the parties agreed, and of consent the Earl was ordained to sell these teinds at nine years' purchase, and to give an heritable and irredeemable right thereof; and decerned the valuation of them, aye till the sale was perfected, to be ten merks the boll of wheat, nine merks bear, and six merks oats. *Vol. I. Page* 11.

1678. *July* 25. LORD CRANSTON *against* TURNBULL.

IN the action between Lord Cranston and one Turnbull, it was ALLEGED there were two sorts of forfeitures; one *via facti*, (as the Earl of Dumbar used to do,) another *via juris*. Two sorts of acquisitions; one by forged accusations against men obnoxious, used frequently in the borders of Scotland; another by sale, and other lawful purchases, in the in-country. And that there were two kinds of treason; one *juris communis, in principem, vel perniciem reipublicæ*; another *juris statutorii*, as theft in landed men, a fictitious and umbratile kind of treason, and, to speak strictly, no treason at all. *Vol. I. Page* 11.

1677. *February* 14 *and July* 27. The DUKE of BUCCLEUCH *against* The Earl of TWEDALE.

February 14.—IN the pursuit, Duke of Baccleuch against the Earl of Twedale, mentioned *supra*, in February 1676, [page 72,] the Lords advised it this day: the interlocutor was long, and must be inquired after. They found the King's ratification of the contract, as father to Monmouth, not sufficient to bind him, &c. The most material parts of it went against Twedale.

Advocates' MS. No. 545, folio 275.

July 27.—In Baccleuch and Twedale's cause, after a new hearing, impetrated

by Twedale, the Duke of Lauderdale being present, they adhered to their former interlocutor; and found the testament of umquhile Francis, Earl of Baccleuch, appointing the overseers to apply his rents, during his children's minority, towards the payment of debts, imported an universal legacy of the dead's part to the heir. *Advocates' MS. No.* 626, *folio* 298.

Anent Deeds Executed in Prison.

It is thought deeds done by men in prison, in favours of them who imprisoned them, are not valid *in quantum* they exceed the preceding ground of debt; and therefore we have a foolish custom of bringing them out of prison for granting writs; for, since they return, that imports nothing in law. See *Peckius de Jure Sistendi, c.* 43; and *July* 1672, *Eshintilly*. *Executio juris non habet secum injuriam*; but if the messenger detains them in a private house, and there they grant bond before they go to prison, it is thought the said writs may be quarrelled, as being granted *per vim et metum*, and as done *in privato carcere*. See 10*th January* 1677, *D. Hamilton* against *Castlemilk*. *Vol. I. Page* 12.

Anent Writs not Subscribed by the Party.

A confession emitted in an inferior court *non probat*, unless it be subscribed by the party, if he can write. Yet if the clerk of the said court be a notary, and if the emitter of the confession and declaration cannot write, I think the clerk's assertion, as notary, will bind him, to the extent of £100 Scots, and not above; unless there be two notaries, and it be proven that he gave them command to subscribe for him; in which case it would bind as a bond. See 28*th January* 1671, *Gibson*,—Mackienz. Crim. p. 418, and Observ. on the Act 1621,—Durie, 17*th June* 1624, *Clerk*,—Stair, 16*th July* 1661, *Osburn*.

Anent Witnesses to Subscriptions.

Where five or six are subscribing a contract or other writ, as parties, the Lords have refused to repute them as witnesses to one another's subscriptions, thereby to sustain the writ against that nullity. *Vol. I. Page* 12.

Anent Judicial Roup of Lands.

The Lords ordained a roup to be made of the estate of Cunnochie, in Fife; which ordinance proceeded on a supplication given in by the debtor craving the same: whereupon Forret was named judge thereto, who emitted a precept to warn all, both at the parish-kirk and market-cross of the shire, who had any interest, to be present such a day in Couper, and bid therefore; and, that there may be no fallacy, the tack warrants the rental. See March 1677.

1678. *November* 6. Alexander Miln *against* Thomas Hay.

Mr Alexander Miln, late provost of Linlithgow, and Mr Thomas Hay, clerk,

having each of them an infeftment of annualrent, for security of some money, due furth of Stewart of Kettleston's lands; Mr Thomas was infeft in several lands lying in Linlithgowshire, and in others lying in East Lothian. Alexander Miln was only infeft in the lands in Linlithgowshire. A competition arising betwixt them, in a poinding of the ground, which of the two infeftments should be preferred; Mr Thomas produced a discharge, granted by him to the tenants of the lands in East Lothian, of their farms, which proved his right and infeftment was clad with possession. Alexander craved to be preferred *quoad* the lands in Linlithgowshire, because he produced a decreet of poinding the ground against these tenants; and contended, that Mr Thomas producing nothing to instruct his infeftment to be in the least clad with possession *quoad* these lands, which were a different subject from the other, he ought to be preferred *quoad* them. Notwithstanding whereof, the Lords, this day, found Mr Thomas his infeftment preferable; and that his possession he had attained of the East Lothian lands, being prior to Alexander's decreet of poinding of the ground against the other, the *jus annui reditus*, being indivisible, was sufficient to clothe his right with possession *quoad* both, though they were upliftable out of different subject-matters, and lands lying in divers shires: and inclined to find that it was in a party's option, who had infeftment out of sundry lands, to take him to any of them for his annualrent. Yet Sir George Lockhart was of opinion, that, in such a case, law obliged him *cedere actionem* to others who had real rights on the other affected lands and tenements, unless he could condescend upon a prejudice he had thereby. See *21st February* 1671 and *22d June* 1671. Possession of a part was found sufficient for the whole, Durie, 17*th December* 1628, *Chalmers*.

Yea the Lords found, in a case less favourable, where one had got an infeftment of annualrent furth of some lands, and thereafter an infeftment in other lands, in corroboration of the first, and was in possession of the lands contained in the corroboration; but thereafter finding them encumbered, and being willing to recur to the first lands; the Lords sustained his possession, as if it had been in the whole, against another infeftment that competed with them.

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1678. *November* 13. SIR R. HEPBURN of KEITH *against* DAVID BORTHWICK.

IN a cause, pursued by Sir R. Hepburn of Keith against David Borthwick his tenant, for removing; as also for leaving so much fulyie on the ground, at his departure, as was contained in his tack: it came here to be questioned, if he was obliged to leave lime, since that was the usual way of improving and gooding land in East Lothian, at least in that corner of it. It was thought lime would not come under the general name of muck, because it has other more principal ends and designs, besides the bringing in of barren lands, *viz.* in building, &c.

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1678. *November* 13. THOMAS WYLIE and RICHARD LOTHIAN *against* FOULLER.

THOMAS Wylie and Richard Lothian, merchants in Edinburgh, against one Fouller, a skipper, for implement of his charter-party.

The Lords, in this case, approved of the Admiral's custom of taking caution *judicio sisti et judicatum solvi*, of sea-faring men; yet they caused try whether the defender was poor, and if the affair might be summarily discussed in a short time, in which cases they might have inclined to favour him with a dispensation; but in regard this matter would run to some time, and probably would require commissions for examining witnesses in Holland, therefore they refused to recede from the custom, but ordained him to find caution. See *25th July* 1678, *Williamson.* And Dury, 16*th November* 1636, *Stewart.*

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1678. *November* 14. CLERK of PITTENCRIEFF *against* The TOWN of EDINBURGH.

IN Clerk of Pittencrieff's discharge, which he offered to the Town of Edinburgh, of their bond, and the decreet he had obtained against them; being minor, Sir G. Lockhart thought his tutors could not be forced nor obliged in law to cause him ratify at his majority, (as was demanded of them,) but only were bound to consent to his receipt of the money, if he was past fourteen, or acknowledge the receipt of it themselves, in his name, if he was within pupillarity. *De plenissima securitate obtinenda*, in paying to minors, see *Tit. Instit. quib. alienare licet vel non*, § *ult.*

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1678. *November* 20. The TOWN of EDINBURGH *against* The COLLEGE of JUSTICE.

THE Good Town of Edinburgh against Mr Thomas Learmonth, advocate, and the remanent members of the College of Justice, for their annuities. Though this cause took up four or five days pleading in the Inner-House, and the fame of it spread wide, yet I shall contract it, and shall only touch some few of the heads I made use of, in deducing the charge, and point at the rest of the debate.

It was ALLEGED for the Good Town,—That they judged it their misfortune to contend with so powerful an adversary as the College of Justice was; (for the Lords had only commanded Sir G. Mackenzie, the King's Advocate, and myself, to be advocates for the Town,) but the justice and piety of the cause was what balanced these disadvantages. That the cause was founded in religion, for the sustenance of their ministers, for whom all nations, even the very heathens, had made, by nature's light, honourable allowances; and it is no more but just, that they should participate of our temporal things. The Good Town, with much satisfaction, had its gates always open to receive in gentlemen's sons, and others, who came from all parts of the kingdom towards this illustrious society, and were no less glad to see them arrive at so great improvements of their fortunes. That, by a bountiful reciprocation, like the circulating of the blood in our veins, she, as a kindly mother, sends forth her colonies back to the country

again. Intreated them to remember Menenius Agrippa's Apologue, by which he reduced the Commons of Rome from their Aventine secession, by his witty demonstrating the bad consequences which issued from the discord between the belly and other members of the body. It is hoped the lawyers, who are the priests of righteousness and oracles of the nation, will not practise a *societas leonina*, which they condemn in all other cases: they will not take a share in the benefit of the Gospel, and cause the Town bear all the burden: *quem sequitur commodum, &c.* 'Tis true, the teinds are the proper and natural patrimony of the church; but where they cannot be had, then the *decimæ personales ex artificio et industria resultantes*, and the *ædium pensiones* succeed in place thereof, as in burghs; which leads us to speak of the annuities, a moderate and easy duty imposed upon the house-maills, for help towards paying the ministers' stipends.

The several ways how ministers were paid, from time to time, within the Town of Edinburgh, since the Reformation was publicly owned in 1560, were here at length related, the history whereof was gathered from the Town of Edinburgh's statutes.

Then was REPRESENTED what was the present settled and constant revenue and funds, out of which the Town paid their ministers, and how much short it fell,—that they were forced to encroach upon their common good, to make up the deficiency,—and that they now wanted the bishopric of Orkney. Then the Town's charge was urged, from the Act of Sederunt of the Lords of Session in 1637, whereby the advocates and other members of the College of Justice consented and bound themselves to pay that annuity at five per cent.

It was REPRESENTED,—That this was no clandestine act, nor any deed of the Town's, but standing recorded in the Lords of Session's books. That *nudæ verborum emissiones in stipulationibus* were not regarded, but suspected of levity, they not carrying so clear an impression and conviction of a fixed design to bind: but here was an act done with much deliberation, gravity, and seriousness, before the Lords, the supreme judges ordinary of this nation; and of which I may say what the Emperors Honorius and Theodosius use on another account, in *L.* 19 *C. de Testam. Omnes solemnitates superare videtur quod inter tot nobiles probatasque personas insertum, toto jure (quod in scriniis vestris quasi positum est) teste, principis conscientiam tenet.* This act was not done in a corner, and is now roborated with the peaceable possession of a grand prescription, never being once drawn in question.

The next remarkable step in the progress is the Act of Parliament 1649; and although it be a 49 act, and swept away by the rescissory one, yet it gives a moral reason of everlasting verity, *viz.*: "That none can withdraw or seek to exeme themselves from the provision of ministers, without contracting great guiltiness before God." And of the justice of which act the Parliament, in 1661, were so convinced, that they renewed it; and upon that act does the Good Town likewise found. And the College of Justice may be so kind as to consider, that much of the Town's debt is contracted upon their account. For their accommodation, they had built that noble fabric of the Parliament-House, and reared it on the place where their ministers' houses of old did stand, being St Giles's Church-yard. They built the Trone-Church, brought in the water by conduits, &c. &c. To whom were they doing it? Were they not making friendship thereby for their own souls? (if this expression may be pardoned, as some-

what Popish.) Is it not too the city of our solemnities, our metropolis and capital, the *communis patria* for citations and confirmations; erected in a royalty *a tempore antiquissimo*; adorned with many glorious concessions of our kings; complimented with badges of royalty and parcels of the sovereignty, as scarlet robes, a sceptre and sword; the chief magistrate made his Majesty's immediate deputy and lieutenant, and ordained, by his Majesty's own ranking, to take the precedency, within the Town's liberties, of all subjects, next to yourself, my Lord Chancellor. That this incorporation (like all other things,) was very inconsiderable in its commencement; and when the advocates were not above ten or twelve, it was reasonable to encourage them with privileges. When they were in their swaddling-clothes it was charity: but now to continue these fictitious and imaginary privileges, when they are turned so potent and formidable, is what will shock the common reason of mankind: for *cessante causa efficiente impulsiva et finale privilegii, cessare debet et ipsum privilegium.* See *Dissertat. Juris Bern. Sutholt. Dissert.* 1, § 16.

The speakers for the College of Justice were, Sir Andrew Birny, Dean of Faculty, Sir George Lockhart, Sir John Cunningham, Sir Robert Sinclair, and Sir John Dalrymple, who repeated their reasons of suspension; and ALLEGED, —That commonwealths, in all ages, had ever honoured advocates with the highest marks of respect; and cited *L.* 14 *C. de Advocatis Divers. Judicior. et L.* 4 *C. de Advoc. Divers. Judic. et Bourit. de Off. Advocat.* That the wisdom of our ancestors had not been wanting in this, but had cumulated it with many encouragements. That the Session is very old, being erected by King James I. by 65th Act of his 3d Parliament, in 1425. That, at the second model and constitution of the Session, in King James the Fifth's time, their privileges are again ratified to them, by Act 68th, Parliament 1537, called,—*The King's good mind anent the Lords of Session;* and though the privileges there indulged seem only *per expressum* to be given to the Senators, yet that's only a *synecdoche partis pro toto*, and the rest of the College are all included in the Lords' privileges, by participation and communication. So great has been the care our Parliaments have had of this august College, that they have met sometimes to do no other thing but to ratify the privileges of it: for, in Queen Mary's 2d Parliament, there is only one act, and it is in favours of the College of Justice. And in the Parliament held *in anno* 1593, there are two acts in that one Parliament ratifying the privileges of the College of Justice; and there is scarce any Parliament that hath not looked upon this as one of the great interests and concerns of the nation. And the 279th Act of the Parliament 1597 is remarkable, not only that it exemes the College of Justice from the prestation of either the *munera personalia* or *onera realia* within burgh; but also it expressly mentions some who lived within burghs at their own liberty, *neither knowing the magistrates in kirk nor policy.* And from all this, inferred that the Town's exacting annuity from them was an unlawful and irregular imposition, contrary to the general laws, and derogatory in particular to their immunities and exemptions from all taxes, impositions, &c. (of which, see Hope, in his larger *Prac. tit.* Of the Session.) And that they were founded in a clear law, *viz.* a printed public Act of Parliament, in 1661, ratifying all their privileges, in the most ample form that can be devised.

Then they ANSWERED to the Act of Sederunt, in 1637,—1*mo*, That it was a simulate, clandestine, patched-up act, the penult day of a Session, and after-

wards disclaimed by the most eminent lawyers. *2do*, It is not binding nor obligatory, neither upon themselves nor their successors. Not upon themselves, because not subscribed: and, in 1661, the Lords would not sustain a judicial act to prove one's consent without his own subscription, in the case between *Osburn* and *Buchannan*: neither can it bind their successors in the office; because, albeit they are a collegiate body, yet this is not in law the *habilis modus* to bind a corporation, so as to make the obligation descend, it not being in any affair depending on the nature of the University; and it being *in materia odiosa*, introducing a burden, it could not be without a preceding warrant under their hands, to authorise the said surrender, and to remain for a lasting monument and instrument of their slavery. As for the Act of Parliament 1661, bearing a ratification of the imposition of the annuity, and ordaining it to be paid by the members of the College of Justice, as well as others; they ANSWERED,—No respect was to be had thereto; because it was only a private and unprinted Act of Parliament, never read, debated, nor voted, but passed among the ratifications; although it is pretended that Sir John Gilmoir, then President of the Session, took it up and amended it in some particulars; and therefore, it clearly falls under the act *salvo jure cujuslibet*, and must stoop to the public law, in that same Parliament, ratifying the privileges of the Session: and Sir George Lockhart urged much from the words of the act *salvo jure*, in the Parliament 1633. That the Town is ill advised to contend with them, from whom they derive much, both of their grandeur and wealth. And if the Session deserted them, *though* only for a while, it would expose them not only to penury, but likewise to contempt.

To this it was ANSWERED for the Good Town of Edinburgh,—That they were far from envying the prosperity and flourishing of the College of Justice,—great and happy might they be,—part of the Town's concern being wrapt therein; but it behoved to be cautioned and qualified, as the acclamations to Pompey were in Rome,—*sit salva hujus civitatis libertate potens*. It is not fit the Session should, like a diseased spleen, grow too big for the body; that would discompose the whole politic frame. For ought we can know or conjecture, every gentleman's family in Scotland, that has more sons than one, are designing them to follow the profession of law; in the next generation the most part of the inhabitants in Edinburgh shall be members of the College of Justice; were it reason that they should plead immunity from the ministers' stipends, or that the far lesser part of the burgesses and inhabitants of the Town shall bear the whole burden thereof? Why do not members of the College of Justice, by this same very rule, refuse to pay any stipend in the places of the country where they have interest? If they have a privilege, why does it not defend them *ubique?* But this is a mere begging of the question, and is *gratis dictum*. Let them produce us one scrape of a pen for this so boasted a privilege of theirs; show us but where it stands recorded, and we will yield up the whole cause. The mistake is fundamental, and the error in the first concoction; they presuppose and beg a privilege, whereas there is no such thing *in rerum natura*. If they say the Act of Sederunt 1637 mentions their exemption by the Secret Council, the same is a narrative, framed by the lawyers themselves, to give a rise and colour to that Act, and is *funditus* convelled and redargued by the books of Secret Council produced, bearing the direct contrary, and ordaining all to pay annuity. *Qui fundat se super privilegio debet id docere*. *2do*, The ministers

being in possession of their annuities, even from the members of the College of Justice, are in the case of *regula cancellariæ apostolicæ*, that *triennalis et decennalis possessor non tenetur docere de titulo in beneficialibus*, but his title *præsumitur;* and which, as it is unanswerable in law, so few or none of these gentlemen standing at the bar can or will deny but they have quietly acquiesced in the said Act, by paying their annuities to the Town's collectors till of late.

Whereas it is alleged the Acts giving privileges to the Lords of Session comprehend all the dependers and retainers, I crave pardon to differ: for, besides that statutes must be understood strictly, and *secundum literam*, upon perusal of the special privileges there enumerated, they will be found to be intransmissible and incommunicable, *et non egredi personas Dominorum.* And, *esto* they were included, exemption from taxes or impositions would not reach this, for annuities are no such thing. And Papon, in his *Recueille des Arrests des Parlemens*, shows, that *les gens de justice*, the lawyers, were found subject to the payment of a duty called *le refouagement* (like hearth-money.) All their brawling is not able to shake themselves loose of the Act of Sederunt. These gentlemen would be very angry if I should deny them to be a faculty and incorporation, vested with that same power to enter into pactions and contracts that any other collegiate meeting is. Now, in other societies do we not see that their own acts bind them? An Act of the Town-Council makes the Town and the succeeding magistrates liable for the debt therein. See Durie, *23d December* 1626, *Peebles* against *Town of Perth.*

If your Lordships of the Session were to renounce your wadset right of the Cannon-mills, needed there any more but a judicial Act? If the consent and subscription of every one should be requisite in such a case, collective bodies should never come to an expedition of their affairs; for remeid whereof, they either bind themselves by their Act, or a syndick constituted by them. And Osborn's case meets not this, for there the judicial Act was made up *ex intervallo super reminiscentiâ judicis:* and do we not all know, that the appending the seal of the priory and metropolitan church of St. Andrews serves for a sufficient symbol of the consent adhibited in the administration of the deeds of the bishopric, without any subscription? Whereas they would thrust the Town's Act of Parl. in 1661, for their annuities, quite out of doors, because the privileges of the College of Justice are ratified also at the same time.

It is ANSWERED,—That *in toto jure generi per speciem derogatur*, L. 80 D. *de* R. F. That the Act of annuities is both posterior to theirs, *et posteriora derogant prioribus*, and does comprehend the specific case controverted, and has determined the members of the College of Justice shall be liable, and so must derogate from their general ratification, which expresseth no privilege at all but in the bulk; and it is unquestionable, if the Parliament had been demanded, whether they intended by that general ratification to exeme them from this annuity, but the legislators would have answered *negative.* And the 165th Act 1598, positively discharges, that no private Acts of Parliament prejudge ministers' livings. Neither is this Act of Parliament, ratifying the annuities, a private Act, nor does it fall within the compass of the Act *salvo jure.* For it is not the printing or not printing of an Act of Parl. that renders it either private or public, but it is the subject-matter and universality of its extent or sanction. And the Lords of Session are intreated to cast their eyes upon a decision observed by Durie, *10th December* 1622, *The E. of Rothes* against *Gordon*,

where the Lords found a particular Act of Parliament (where there was no ambiguity resulting from the interpretation of it,) fell not within the Act *salvo*; and that the Lords had no power to decide whether it justly or unjustly statuted, but that the same ought only to be tried in Parliament. See also Dury anent the Act of Parl. rehabilitating Francis Stewart. And Haddington, in his *Præct.* 1611, tells, the Lords sharply reproved an advocate for debating the legality and justice of an Act of Parliament. So that the Lords will find that they are not empowered to meddle with this Act, much less to go over its belly and annul it. And it is with no small aversion that they contend with the College of Justice; but they cannot be otherwise answerable to that faithfulness required of them, they being only curators, overseers, and administrators of the Town's privileges, and none of which they have power either to transact or give up, being disenabled by the 112th Act, Parl. 1587, discharging burghs to dispose on their liberties without consent of King and Parliament.

Whereunto it was REPLIED, for the College of Justice,—That they needed not instruct a privilege, because, as to immunity from burdens, they are founded, not by privilege, but *jure communi*, as Anton. Faber in his *Codex Sabandus, tit. de Dignitatibus, Def.* 10, shows. The *Regula cancellariæ, Triennalis et decennalis possessor, &c.* loses its office wherever the title of the possession can be shown, as was found in *July* 1676, betwixt the *B. of Dumblane* and *Kinloch of Gilmerton*; and here *docemus de titulo vitioso et invalido, viz.* the Act of Sederunt, and Act of Parliament 1661, and so the rule fails. See *30th July 1679, Ewart.*

And, as for the possession that the Town has, 1*mo*, It is violent, by illegal poindings. 2*do*, The lawyers, what they give of that kind towards the sustentation of the ministers, will pay it as a benevolence; not as a debt that can, *ex necessitate juris*, be extorted. And, if the Town will pass from their compulsitors, the College of Justice will very cheerfully contribute and assist. And yet those gentlemen, the ministers, who deserve their stipends very well, need not be anxious that any thing will be deducted off their stipends, (as the Town of Edinburgh threatens them, if the College of Justice annuities be taken from them.) For, 1*mo*, All those who ought to have the name of the College of Justice, *viz.* The Lords, advocates, writers to the signet, and clerks, (excluding ordinary writers, notaries, messengers; the Lords', advocates', and writers' men; clerks of Exchequer, &c.) their annuities will be within 1200 merks by year, as, after trial and calculation, was found. 2*do*, The College of Justice offers to farm the annuity, and other rents which have been mortified and allotted for their ministers, and to pay their whole twelve ministers completely therewith, so that there shall be no deficiency; so that, of necessity, there has been either malversation or negligence in the bygone administration of it. Whereas it is pretended that this annuity is not an imposition, and so not comprehended in the Act exeming from impositions, it is desired they may give it another name. And Gasper Clockius, in his learned *Tract. Nomico-politicus de Contribut. et Collect. Imperii*, hath spent a whole section, *viz. c.* 15, to prove that *legum doctores et professores* are *immunes ab onere collectarum*. The Act of Sederunt 1637 can never be sufficient, without a consent in writ, to entail that servitude; neither will a naked Act of a Town-Council bind a debt on the Town, or a judicial Act of the Lords, renouncing any wadset they had for security of their mortified monies, oblige them; but, in both cases, there behoved to be a previous

Act subscribed for the warrant of both. The instance from the common seal of St. Andrews, in place of the chapter, signifies merely *ex instituto*, and in vigour of a special statute. See *4th November* 1671, *E. of Lothian, &c.* against *The Town of Edinburgh*, about the Lady Yester's mortification.

Besides, they had very pregnant reasons to think this Act of Sederunt was in 1643 past from by the Town; for they had scrolls of Acts under Mr David Herriot, advocate, his hands, and other memorandums, bearing, That the Town had restricted the said Act of the annuities, in so far as concerned the members of the Session, to five years; and they had exhibition depending for recovery of the principals, and craved the Town of Edinburgh might be so ingenuous as to exhibit their public Acts and records, which might give light to the truth, (which the Town did, but nothing was found in them to fortify their allegeance:) and that, in 1658, the College of Justice had obtained a decreet of declarator of their privileges against the Town; but the same was now lost, or abstracted, and not booked.

Then the lawyers repeated the heads and articles of their present declarator depending against the Town, *viz.* 1*mo*, Exemption from annuities. *2do*, From all jurisdiction, civil or criminal, that the Town might not be their judges in any case. The King's Advocate seemed to yield, that the Town should only have *imperium* over them in case of riots committed in vacation time; for, during the Session, he thought the Lords were only to be applied to in such cases. Some thought this a too large and Cassandrian concession, for it pleased neither party. (See March 1671, No. 161.) *3tio*, The College of Justice craved to be free from paying the small dues at the ports for their goods or plenishing brought in or out, which, by the Town's gift thereof, are destinate to mending and repairing the bye-ways and avenues leading to the city, which is a public good. *4to*, Craved that it might be found lawful for them to keep tailors, masons, or other craftsmen, though unfree, within the burgh, to work their work in their own houses, without disturbance or molestation, or being seized on, and their work confiscated by the trades of Edinburgh and their deacons, on the pretence of their privileges contained in their several seals of causes, which seem contrary to public utility. *5to*, That they may have convenient seats in the churches for hearing sermon; and that the meanest burgess may not be preferred to them, as has been hitherto done, in competitions. And here, when it came to a communing, they craved the high cathedral church to be appropriated for the Lords of Session, and the rest of the College of Justice, and to have their own minister, and they would pay him; but the Town of Edinburgh cannot part with any patronage within their bounds, in the undoubted right whereof they are stated. *6to*, That in imposing of stents by the Town's own authority they be absolutely free. And, as for those laid on by Parliaments and Conventions, that, according to the Acts of the Town-Council of Edinburgh, and particularly in 1660, the College of Justice may have some of their number present, [to take care] that they be not unequally assessed and burdened for their lands. *7thly*, That the imposition of two pennies upon the pint of ale may, conform to the contract betwixt the Good Town and the College of Justice, and the shire of Mid-Lothian, be managed with common consent; and that the Town may exhibit their count-books, to the effect it may appear whether it has been applied to the right use, for paying off and defray-

ing the Town's debts, or if it has been inverted. See, anent this, many things scattered up and down in other collections beside me.

Nota.—The mortifications the Town sets apart for their ministers' stipends, are, 1*mo*, The annuity, which commonly is rouped at about 11,000 merks. 2*do*, The rents paid for the seats in the church, rouped at 3,600 merks. 3*tio*, Their old kirk rents, being mortifications and ground annuals due to the chaplainries and altarages of St. Giles's collegiate church, amounting to 3000 merks. 4*to*, The merk upon the tun of all goods imported into Leith, set at 3,400 merks, making in all little more than 20,000 merks. Whereas the Town, without ever having got a charge of horning, or being pursued, past memory of man, pays 27,000 merks *per annum* to their ministers.

Another complaint of the lawyers was, That the Town's collectors poinded their houses summarily, without suffering the 15 days of the charge to expire before the poinding, as the Act of Parliament 1669 requires.

The President declared, the Lords would hear no other points till that of the annuities was first determined. *Vol. I. Page* 21.

1678. *November* 20. SETON *against* ———.

MR Alexander Seton, minister at Linlithgow, against ———. The Lords in this case found the same which they had decided formerly, That the allowance of a comprising was not absolutely necessary, but only in case of a competition, where it will give preference to the comprising allowed; but the debtor cannot object the want of it as a nullity. See Hope's *Min. Pract. c.* 10, and 25th July 1679. *Vol. I. Page* 25.

1678. *November* 30. JOHN MARISHALL *against* JAMES SCOT.

The Lords this day readvised the testimony of the witnesses adduced in John Marishall's cause against James Scot, and adhered to their former sentence, and found the contravention of the lawborrows fully proven; and that Scot's son was then *in familia* with his father, and was not merely making a visit to him. But, in respect Scot is not a freeholder, but only a feuar, they restricted the 1000 merks decerned for, to 500 merks, which is the only pains of contravening lawborrows imposed by the [act] 1593, *c.* 166. *Vol. I. Page* 26.

1678. *December* 3. ANENT MOVEABLES.

IT was questioned, if, in a disposition of moveables, the words *utencils* and *domicils* comprehend habilyiment of one's own body. And it was generally

thought these words will not comprehend them. *An caligæ veniunt nomine vestimentorum*, see Calvin's Lexicon, *v. Caligæ*. *Vol. I. Page 27.*

1678. *December* 6. CLACKMANNAN'S CREDITORS competing.

IN the competition between the creditors of Clackmannan, the Lords did not indeed decide it, but inclined to find, that their equal presenting of their signatures of confirmation of their base infeftments to the Exchequer on the same day that Alexander Miln presented his, did not bring them in *pari passu* with him, unless they had taken instruments upon their presenting thereof judicially: which difference seems very strange, and not to be required by 66th Act Parl. 1578, declaring, that the King and his compositors ought not to deny confirmation to any that seek it. Yet Hope, in his *Min. Pract. tit.* 10, *Of Apprysings*, § 11, seems to require taking of instruments. But here they were so boasted and over-awed by the Duke of Lauderdale's presence, who owned Alexander Miln, that they durst scarce take instruments.

In 1673, in the case of Hugh Sinclair of Binny and his Creditors, the Lords found the presenting of a signature to the Exchequer equivalent to a charge given to another superior.

It was likewise sustained to Bruce of Powfouls, who was cautioner in a great many debts for Clackmannan, that he was infeft about the same time with Miln, and raised his summons for poinding the ground and maills and duties before the Lords, and executed them that same day that Miln obtained his decreet before the Sheriff of Clackmannan. This diligence was sustained by the Lords to bring in Powfoulls *pari passu* with Alexander Miln. *Vol. I. Page 27.*

1678. *December* 7. WESTGAIRTH and his FACTOR *against* MICHAEL SEATON.

WESTGAIRTH, an Englishman, and his factor, charge Michael Seaton in Burntisland. The Lords sustained compensation upon Westgairth's ticket of receipt of the potashes; albeit it was alleged that the price of them was not liquid, *nec constabat* what kind they were of, there being some potashes near the double rate better than others. Yet the Lords received it, because *de proximo poterat liquidari, L. ult. C. de Compensat.* And named Bailie John Hall, and Robert Douglass, soap-boiler in Leith, to depone what the cask or barrel of potashes at that time was worth; and declared they would modify accordingly: which is a very rational method in such cases, and they followed it in valuing the goods of the Calmer ship, &c. *Vol. I. Page 27.*

ANENT MINISTERS' STIPEND, payable furth of BARONIES.

I WAS at this time informed of a case that happened, in 1666, to be decided betwixt the Creditors of Balcomie, thus:—A minister has a decreet of locality, appointing so much of his stipend to be paid furth of such a barony, it being

then all in one hand. It comes thereafter to be dismembered, and in sundry hands. The minister pursues one of them for the stipend due furth of the whole.

He ALLEGED,—He was only liable *pro rata portione*, conform to his teinds, and that the most he could be obliged in was, *dedere ipsa corpora* of the teinds; for stock pays not ministers' stipends. Yet it is affirmed, the Lords found him liable *in solidum*, reserving his relief against the rest for their proportional possessions; since the minister *ab initio* had to do with but one: and if, *ex post facto*, by alienations unknown to him, and without his consent, it came to be divided, he who is *persona in jure favorabilis*, must not be distracted from his function to convene all: and the whole barony was made liable by decreet of locality, and so *unaquæque gleba serviebat;* and the stipend was in this like the soul, *tota in toto, et tota in qualibet ejus parte.* And such a quantity being imposed on the barony, it was without respect to the teinds more than to the stock; and, in this case, both were confounded and consolidated together. Yet, in law, the teinds seem to be the proper and specific subject-matter which can only be affected with ministers' stipends. Act 10, Parl. 1567. See Durie, *20th Dec.* 1622, *Preston.* *Vol. I. Page* 28.

1678. *December* 12. GAIRDEN *against* GAIRDEN, her Husband.

A BILL of advocation was presented to the Lords of Session, of a process of divorce upon adultery, pursued before the Commissaries of Edinburgh, by one Gairden, against Gairden her husband, in regard of some irregularity and informality in the Commissaries' procedure, in examining of witnesses before litis-contestation.

The Lords refused the bill, and remitted it back to the Commissaries, as the only judges competent to such actions in the first instance; but if they had found any irregularity, the Lords would have rectified the same, and sent it back to the Commissaries; as they have done in the case of services of brieves, and the like. See an example of it in the case of *Fork* and *Fyfe*, *July* 1678. *Item*, in advocations from the Admiral Court, June 1678, [No. 391.]

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1678. *December* 12. REPRESENTATIVES of WILLIAM KAY *against* CLEGHORN.

IN a cause pursued by the executors and representatives of William Kay, late bailie in Edinburgh, against Cleghorn a baxter there, before the Commissaries of Edinburgh, for payment of a debt which they referred to his oath; he deponed, it was true he was once owing that debt, but it was as true he had paid it, but only the sum of yet resting. This being advised by the Commissaries, they repelled the quality of payment, and ordained him to prove it *aliunde*.

This being quarrelled upon iniquity, before the Lords, in a suspension, they found the quality intrinsic, and assoilyied, and would not divide the oath. See

14th November 1677, *Edgar*; *30th July* 1678, *Hamilton*; and Dury, *10th July* 1624, *Kinloch*; *28th March* 1629, *Gall.* *Vol. I. Page* 29.

ANENT COMPRISING.

IT was queried, where a man comprises lands of a value worth less than the sum he deduces the comprising for, if he can charge his debtor for the superplus of the sums above the value of the lands comprised. Some think he cannot, because the style of comprising runs, that the lands apprised are adjudged and decerned to him in payment and satisfaction of the sums apprised for, and doth not say, in satisfaction *pro tanto*; and so like a judicial vendition, the appriser seems to acquiesce, and accept of the apprised lands for payment. But this seems *durum et iniquum*; however, it is not yet decided, and it were surest, in such a case, to make the decerniture words of the comprising to bear only *pro tanto*, and in part of payment. Craig thinks, *p.* 331, he may crave the remanent; and the Roman law decides the same, *l.* 28 *D. de Reb. Cred*; for an apprising is *pignus prætorium*. And the 6th Act, Parl. 1621, decides he may crave the remanent. *Vol. I. Page* 29.

1678. *December* 12. KIRKALDIES *against* KIRKALDY of GRANGE.

IN the action, Kirkaldies against Kirkaldy of Grange, for maills and duties, upon a comprising, it came to be debated, if a mother, who is tutrix, can emit any promise, and can be forced to depone thereon, to prejudge her pupils. It seems not. Yet see Stair, *25th July* 1661, *Helen Hepburn*, where the Lords found curators might transact. *Vol. I. Page* 29.

1678. *December* 14. MENZIES of GLASSIE and CAMPBELL *against* NAPIER of WRIGHT'S-HOUSES.

IN the cause, Menzies of Glassie, and Campbell his assignee, against Napier of Wright's-houses, (Jan. 1678, page 223;) they offered to prove the passive titles against Wright's-houses as representing his uncle, *prout de jure*, and there is a day assigned them to that effect; after which day Wright's-houses circumduces the term against them for not proving. The pursuers, to stop the circumduction, declare they refer the passive titles to his oath. Wright's-houses being ready to depone, they resile, and declare they will prove *aliunde*, viz. *scripto*; and crave a diligence for recovery of writs, wherein he not only designs himself heir, (which were not *per se* relevant,) but also obliges himself, if need be, to serve heir.

This the Justice-Clerk refused, as against all form; but, in regard the pursuers offered to make faith that the writ was *noviter veniens ad notitiam*, he ordained them to depone thereupon; and, if they affirmed it, then he allowed them a short term, but no more. *Vol. I. Page* 29.

1678. *December* 19. GRAY of SKIBO *against* COLIN ROBERTSON.

IN the action, Gray of Skibo against Colin Robertson, my Lord Newton would not permit Skibo to propone improbation, by way of exception, against his father's bond granted to John Robertson, because the bond was not produced, nor *in campo*, and there was nothing produced but a decreet recovered upon the bond; and so, except the production were satisfied, they could not proceed to cognosce on the falsehood of the bond; and therefore he decerned, reserving their improbation, by way of action, as accords.

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1678. *December* 19. PATERSON *against* JOHN WILSON, Mason.

PATERSON against John Wilson, mason. Newton found competent and omitted, in inferior decreets, not receivable where the exception omitted consists *in jure*, because the party and his procurator might be ignorant thereof; but not where it consists *in facto, præcipue proprio vel recenti*, that the party cannot but know of. *Vol. I. Page* 29.

ANENT the PUNISHMENT of PERJURY.

The pains of perjury, by 19th Act 1551, *viz.* confiscation, infamy, and warding, seem too slender, and its punishments ought to be augmented to death. See M'Keinzie's *Criminals*. *Vol. I. Page* 30.

ANENT *DEBITA FUNDI*.

THE price of a minister's manse, nor the communion elements, are not real *contra fundum*, nor *onera realia quoad* bygones, but only for the future. See the Act of Parl. 1649, making the stipends of ministers *debita fundi*; but it is rescinded. See a similar case, 19*th December* 1679. *Vol. I. Page* 30.

ANENT RESIGNATIONS.

It proves very oft prejudicial, that there are no diets of Exchequer more frequently kept in the vacance for receiving resignations; whereby the granter of the procuratory of resignation dying, the whole falls, and the infeftment cannot be expede upon that procuratory. The Act of Parl. 1600 empowers the Secret Council to accept resignations; but that Act is in desuetude.

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1678. *December* 19. SEATON of BLAIR'S HEIRS-PORTIONERS *against* LORD PITMEDDEN.

IN the pursuit, at the instance of the heirs-portioners of Seaton of Blair against Sir A. Seaton of Pitmedden, the Lords found, on the 22d December

1674, that a brother nor no other *in linea collaterali* could be convened as successor *titulo lucrativo post contractum debitum*, but only he who was *alioqui successurus necessario*, and not only *probabiliter*. See *February* 1670, *Whitefoord*; and *February* 1674, *Lothians*. *Vol. I. Page* 30.

ANENT MULTURE of BEAR.

I SAW a decision dated *3d July* 1673, *Oliphant* against *Oliphant*, where the Lords found that bear behoved to pay multure, though it tholed not fire and water. *Vol. I. Page* 30.

1678. *December* 20. The TOWN of GLASGOW *against* SHAW of GREENOCK.

IN the action between the Town of Glasgow and Shaw of Greenock, the Lords having considered the Act of Parliament 1672, Anent the Privileges of Burghs Royal, They found, if the royal burghs do not seize the unfree goods, they can have no action for the value of what they can prove was sold and vented by unfree-men, unless they had either apprehended them, or used arrestment; in which last case, though the said unfree commodities be out of their hands, or consumed, yet the Lords will hold the unfree-men *pro possessoribus, quia dolo desierunt possidere*. *Vol. I. Page* 30.

1679. *January* 1. MURRAY of SKIRLING *against* MR BUCHAN, his Minister.

THE Lords, upon occasion of a bill given in by Murray of Skirling against Mr Buchan his minister, in a process between them, made an act of sederunt anent the clerks their minuting of defences, *viz.* to pass over all dilatory defences, unless they be sustained, and to write all immediately upon the process, and not upon scrolls and books apart, out of which they afterwards extend them. This act was thought impracticable; and by this way it cannot be known what was competent and omitted, and what was repelled. *Vol. I. Page* 30.

ANENT PACTIONS *CONTRA FIDEM TABULARUM NUPTIALIUM*.

ANENT Pactions *contra fidem tabularum nuptialium*,—see June 1677, *f.* 288, and *Donald Fouler's* case, in Mack. Observ. on Act 21, Parliament 1621.

A bond granted by a wife after a contract of marriage, or proclamation of banns, is reputed *stante matrimonio*: as was found in *Lady Bute's* case; *ergo*, a bond granted by her future spouse to her at that time is *in pari casu*. See *June* 4, 1679, *Ewart*. *2do*, Bonds granted *inter sponsum et sponsam in æstro amoris*, are more to be reputed donations, and more exorbitant than what are given after the marriage; there being a greater eclipse of the use of reason at that time then afterwards. *3tio*, It is *contra fidem tabularum nuptialium*. Anent donations *inter virum et uxorem*, see Durie, 17*th July* 1632, *L. Borthwick*; *et infra*, 18th *December* 1679, *de Pacto Proxenetico*; and 8*th January* 1680, *Raeth*.

The Lords have found, at least inclined to find, deeds granted betwixt a contract and a marriage are not to be construed as revocable donations *inter virum et uxorem*, between *Home* and *Home;* and the reason of circumvention, *super æstro amoris*, was debated, but not decided, between *Ranken* and *Reed*, in 167–. And the Lords reduced bonds *contra pacta nuptialia*, not only in *Donald Fouler's* case, but likeways in the case of *Lockhart of Wicketshaw* against

where they were entered into by parties that were under the power of their parents living, without their consent. But if both parties were *sui juris*, and their parents dead, *quid impedit* but they may enter into new pactions? See *Arbuthnot* against *Knox*, *15th December* 1660. *Vol. I. Page* 31.

1679. *January* 9. Isobel Kinnaird *against* Lyon.

In an exhibition *ad deliberandum*, Isobel Kinnaird against Lyon,—ALLEGED,—Offers to prove the pursuer is a bastard, at least the person by whom the contingency of blood is derived is a bastard, at least was so holden and repute, (which is sufficient *in re antiqua*;) and so she has no interest to crave exhibition, since she cannot be heir. This was sustained as relevant. *De probanda filiatione per indicia et conjecturas*,—see Mascard. *de Probat. v. Filius.*

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1679. *January* 10. Alexander Auchmouty *against* The Earl of Dumfermline and his Tenants.

Mr Alexander Auchmouty pursues the Earl of Dumfermline and his Tenants. ALLEGED,—The process being raised in the last Earl's lifetime, it ought to be transferred against this Earl. The Lords, upon the report of Newbyth, found no necessity of transferring, because the pursuer was insisting against his own tenants; and Dumfermline's procurators had proponed an exception of payment; and now to allege that it ought to be transferred, was to propone a dilator after a peremptor, which is against all form: and his brother was only called *pro interesse*. See *Dec.* 1677, *Dumfermline.* *Vol. I. Page* 32.

1679. *January* 10. Antonia Pieronnin and Thomas Wilson, her Factor, *against* Janet Gordon, Relict of Morison of Pitfour.

Antonia Pieronnin, and Thomas Wilson her factor, (*vide* 8th Dec. 1677, p. 205,) having obtained a decreet against Dame Janet Gordon, relict of Morison of Pitfour, as representing her husband upon the passive titles, being holden as confessed thereon; the Lords reponed her again to her oath, in a bill of suspension, and ordained her to depone anent the passive titles; and that her present husband's protestation against her deponing to his prejudice should not hinder the same. *Vol. I. Page* 32.

1677 *and* 1679. The SKINNERS of EDINBURGH *against* The FLESHERS of the CANONGATE.

1677. *November* 22.—THE Town of Edinburgh and their Skinners, both by an Act of the Convention of Burghs, and an Act of the Town-Council of Edinburgh, having the inspection of the hides and skins brought to the markets by the fleshers, to see if they be cut or abused in the flaying, and rendered insufficient,—it being a staple commodity carried abroad,—and been empowered and in use to fine, where, upon visitation, they found them faulty and insufficient: and having fined some of the fleshers of the Canogate upon this head, they presented a bill of suspension, founded on their seal of cause, from the Baron of Broughton, in 1612, erecting the fleshers in a corporation, and so could not be visited by strangers. See the debate in the Informations. Which being reported to the Lords by Reidfurd, they found their seal of cause, from the Baron of Brughton, gave the defenders express power to impose, exact, and levy; and that it was anterior to the Town of Edinburgh's right to the regality of the Canogate; yet that the baron-bailie, put in by the Town of Edinburgh, came in place of the lord of the regality, and was not so denuded and secluded thereby but that they might also fine for insufficient skins, the jurisdictions being cumulative.

Then the Fleshers of the Canongate offered to prove they were in immemorial possession of fining, conform to their gift and seal of cause. And the Town of Edinburgh, and the Skinners and Cordiners of Edinburgh, their visitors, proponed upon interruptions, and their use likewise of fining in the Canongate. Both which were admitted. See Act 85, Parliament 9, Queen Mary, in 1563; anent bringing Skin and Birne to the Market. Birne is the burnt mark.

The words of the interlocutor be these:—The Lords having considered the seal of cause produced, they find the Fleshers of the Canogate are incorporated in a free trade; and have the privilege of their said seal of cause, and may apply the fines arising by their own acts, to their own poor, conform to the said seal of cause. And find, that the baron-bailie of the Canongate can only judge of transgressions of the Act for visiting skins and hides; but may appoint visitors to visit the skins of beasts, either killed by the Fleshers of the Canongate or brought to the markets thereof, and to report. And find the fines imposed by the baron-bailie, for transgressions of the said acts, are not applicable to the poor's box of the fleshers of the Canongate.

Advocates' MS. No. 660, *folio* 308.

1679. *January* 10.—The cause of the Skinners of Edinburgh against the Fleshers of the Canongate, being again reported to the Lords;—they adhered to their former interlocutor; and find, that the Town of Edinburgh has the nomination of the visitors of the skins, and will not limit them therein; but recommend to the magistrates to choose honest and fit persons. As also, for the second point, find the Incorporation of the Fleshers of the Canongate, by their seal of cause from the Barons of Broughton, in 1610, has not the right of thir fines; but give them to the baron-bailie, as they had done before.

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ANENT *GESTIO PRO HÆREDE.*

ONE, as heir to his goodsire, passing by his father, is pursuing for a debt ow-

ing to his goodsire. The defence against the debt is, that it was prescribed, and past forty years. He ANSWERS,—Interrupted by his father's minority. *Quær.* if this will be a behaviour as heir to his father, since, by making use of his father's minority, *reportat commodum*, and he reaches the sum contained in this bond; which otherways would be found prescribed. The eminent lawyers differed in their opinions upon this question. *Vide infra*, a similar case, stated at the end of *February* 1680, *No. 5.* *Vol. I. Page 32.*

1679. *January* 11. The EARL of HOME *against* The LAIRD of KYMMERGHAM and the LADY AYTON, his Spouse.

THE Earl of Home, as donatar, (*vide* 6th Dec. 1677,) pursues the Laird of Kymmergham and the Lady Ayton, his spouse; that he, as his Majesty's donatar, had right to Kymmergham's *jus mariti* of the barony of Ayton, in respect of his clandestine marriage, and the certification of the 9th Act Parliament 1672.

It was fully debated, but not decided. Sir G. Lockhart, and many other lawyers, thought the *jus mariti* was not *caducum*, nor at the King's disposal. For the said Act 1672 doth not bear that the marital right shall be confiscated. But, say they, the *jus mariti* is *nullius*, not being the husband's, and so *inter ἄδεσποτα*, falls to the crown. *Nullo modo;* for it remains with the wife and her heirs; and, if it be the *jus relictæ*, with the husband and his heirs. And it may be exemplified in this case; where an inheritance devolves, *stante matrimonio*, to the wife, by succession or disposition, then the husband would not here get the *jus mariti* of it.

There was much debated from the canon law, anent the clandestinity of a marriage, being by one that had not the character, or in another nation, or incapacitated only *jure positivo municipali.* But, in the Roman church, matrimony is a sacrament. *Vol. I. Page 32.*

ANENT BILLS of SUSPENSION.

AN Act of Sederunt was made, That where there is a bill of suspension once presented, if the suspender compear not thereafter, yet the former charge shall not be put to execution, till an instrument be taken against the presenter of the bill of suspension, to put him *in mala fide.* *Vol. I. Page 32.*

ANENT ESCHEAT.

QUÆR. if a man's curiality falls under a single escheat. It seems not; because the courtesy seems equivalent to a liferent tack, which, by the Act 1617, is only carried by a liferent escheat. *Vol. I. Page 33.*

1679. *January* 11. SLIT *against* DOUGLAS.

THE case between Slit and Douglas being reported,—the Lords annulled

and reduced a bond, because it was proven to have been given to shun a poinding *via facti* upon a decreet, which decreet stood actually suspended, and the suspension intimated and undiscussed; and therefore they reponed against the bond. *Vol. I. Page 33.*

Anent Poinding of the Ground.

It was queried, if a party has a good interest to say,—"If you take out a decreet of poinding of the ground against such lands, my lands, which lie runridge therewith, must be expressly reserved forth of the said decreet, since the pasturage for beasts on these places is promiscuous, and they may easily pass from one rig to another." But now the Lords following equity, not only in ordinary poindings but also in poindings of the ground, if the party be ready to depone that the goods are his, they find that ought to stop poinding, even as it did formerly in the poinding of moveables. See *February* 1676, *Lawson*, [No. 465, § 3, page 61.] *Vol. I. Page 35.*

Anent Liferent.

A man infefts his wife in liferent of some lands, which paid victual; thereafter he sets a tack of these lands, and makes commutation from one species of victual to another, or from victual to money, in diminution of the former rental. Whether will the relict be obliged to stand to this new tack or not? It is thought she ought not to be prejudged thereby. *Vol. I. Page 35.*

1678 *and* 1679. Cleland of Hearshaw *against* Lockhart of Birkhill.

1678. *January* 1.—Cleilland of Hearshaw, as assignee by Hamilton of Green, charges Lockhart of Birkhill, &c. to pay the sum of £440 Scots, for not presenting of Claud Hamilton of Letham, conform to their bond of cautionry.

They suspend on this reason, That, at the day mentioned in the bond, the debtor, who was to have been presented, was sick; and that, *primo quoque tempore*, so soon as he recovered, about two months thereafter, they offered him; which ought to exoner them.

Answered,—By their bond, they were obliged to have sisted him in the prison of Hamilton; which they did not: and these obligations are *stricti juris*, and to be performed in *forma specifica*.

This being reported by Harcourse, the Lords, before answer, ordained the witnesses in the instrument of the offer of him after his recovery, to be examined. *Vide supra, 2d July* 1670, *num.* 58.

The suspenders aimed likewise at this reason, That their obligation to sist the principal debtor at such a precise day, was conditional: as if they had promised under the condition, *si navis ex Asia venerit*; and he being impeded *vi majore et casu fortuito*, by sickness, they were not liable, thereafter, to present him when he reconvalesced, but were *simpliciter* free. This was not debated. *Vide legem* 26 *C. de Fidejussoribus.*

Modica mora, in producing one whom we are bound to enter, makes him not incur the penalty, says *Paulus J. C.tus in Lege* 91, § 3, *D. de Verborum Obligationibus,—Hattomani liber juris consultus dictus, pagina* 66. *Vide supra*, 1*st November* 1677, *Jameson. Vide* 18*th January* 1679, thir same parties. See *Lanfrancus Balbus, decisione* 345.

Advocates' MS. No. 699, *folio* 314.

1679. *January* 18.—In the action between Cleland of Hearshaw and Lockhart of Birkhill, (*Vide* 1*st January* 1678;) the Lords having ordained the instrument to be proven in thir terms,—That, when they sisted and offered him, Hamilton of Green either discharged them to take him to prison directly, or in words of equipollent sense; the *testes instrumentarii* being examined, *viz.* Monkland and Raploch, they deponed that Green only refused to accept of him there, at his own house.

The Lords having advised the testimonies, they found the depositions did not prove; and therefore found the letters orderly proceeded against the cautioners.

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1677 *and* 1679. HARY, &c. STRAITONS *against* their Brother, the LAIRD of LAURISTON.

1677. *November* 8.—A FATHER dies, leaving several children: he grants a bond of provision, to be paid by his eldest son to the younger, and ordains their portions to be paid to them at their age of fifteen years, or at the next term after their marriage. *Quæritur* in whose option this alternative is. It may seem to be introduced in favours of the eldest son, who is debtor; for, *in alternativis obligationibus, electio est debitoris*; especially here, that if they die before the term of payment, it is provided their portion shall fall in return, and accresce to the eldest. Yet, others think it is in the option of the children, that, either at fifteen or at the next term after their marriage, they may call for their principal sum; for the annualrent is unquestionably due to them for their aliment: otherwise (say they) this inconvenience will follow, that it shall force them, immediately after they are fifteen, if their brother refuse payment, to anticipate and run headlong on marriage, and so the clause would abridge *libertatem matrimonii* and that mature deliberation which is requisite in a case of so great concern; which is absurd, and *contra leges et bonos mores.* And they make a distinction *inter alternativa et alternata*, which I conceive not; only we say, in patronages, *vicibus alternatis*, not *alternativis.*

Advocates' MS. No. 650, § 4, *folio* 805.

1679. *January* 21.—In the actions pursued by Hary, &c. Straitons, children of the second marriage to the Laird of Lauriston, against Lauriston their brother of the first marriage, for payment of their portions natural, or provisions due at their marriage, or age of fifteen,—*vide* 8th November 1677,—the Lords found the election of their alternatives was *debitoris*; and therefore that their portions were not due at fifteen, but only at their marriage; which was the election made by the heir, their eldest brother, who was debtor. This decision was upon a report.

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1678 *and* 1679. SIR JAMES HAMILTON *against* SIR ALEXANDER FRASER of DOORS.

1678. *February.*—*SUPRA, folio* 295, *num.* 615, in the margin of Glenfarquhar and Kair's action, we have marked that the Lords refused a bill given in by Sir James Hamilton, craving Sir Alexander Frazer of Doors his oath, whether or no the bond of £800 sterling he has assigned to Burnet of Leyes, was not granted by his father *sub spe numerandæ pecuniæ,* and if some of it was not paid to him since; because they were not in a process. Whereon they raised an action against the doctor, and craved his oath thereon.

ALLEGED,—He, having assigned it for onerous causes, could not depone in prejudice of his assignee for onerous causes; who concurred.

REPLIED,—He declared whatever Sir Alexander should depone, should not prejudge the assignee, nor be obtruded to him, but only infer recourse of warrandice against Sir Alexander. This Newbyth sustained, and therefore repelled our allegeance.

Then we produced a letter posterior to the bond, wherein Sir James his father acknowledges this debt; and this, joined with the bond, being *geminata confessio,* was so strong that it should relieve Sir Alexander from deponing now, *post tanti temporis intervallum,* being thirty years. Yet the Lords ordained him to depone, and granted commission to Messieurs Erskin and Forrester.

Then we ALLEGED,—That Sir James pretended he had some writs for adminiculating his summons; and therefore craved, that either he should pass from all writ, or then, upon oath, to produce all he had, and transmit them, with the commission to London, that Sir Alexander might see them. This the Lords ordained him to do; and he, upon oath, exhibited all, that nothing might be kept up to be the ground of a new plea. The interrogatories were adjusted, and inserted in the commission. *Advocates' MS. No.* 733, *folio* 321.

1678. *July* 30.—In the declarator pursued by Sir James Hamilton against Sir Alexander Fraser of Doors, (26th February 1678;) the Lords having advised Sir Alexander's oath, which acknowledged the ticket of £300 sterling produced to him was his hand writ, and a part of the 800 pounds' bond, but was paid; and denied that the bill upon his wife, for £200 sterling, related at all to this bond, &c.

The Lords, after debate, having considered the said oath, they sustained the ticket of £300 sterling to be deduced; and restricted the double English bond of £1600 to the single sum of £500, with annualrent to Whitsunday 1646, at which time they found the £100 ticket ought to have been deduced; first out of the annualrent then due of the said L.500, and then out of the said principal sum. And find, that the residue of the said principal sum ought to bear annualrent from the date of the bond, aye and while the payment be made of the said principal sum; and refuse to allow the unsubscribed bill for L.200.

It was CONTENDED, the Lords behoved to consider the oath complexly, and not separate the quality of paying that L.300 ticket from the rest, since though they had writ to prove it by, yet in effect it was a null writ wanting witnesses, and which nullity was only supplied by Sir Alexander's oath, and so must be taken as he has deponed, in the whole complication. And in the 14*th Nov.* 1677, *Edgar* against *Ewing,* the Lords refused to divide the said Ewing's qualified depo-

sition. Yet, in a case of *Sir James Murray of Skirling's* in 1671, where a debt (which they could prove by writ) was referred to his oath, and he confessed it, but withal deponed it was paid; the Lords divided the quality from the oath, and found it proved the debt but not the payment, which resolved into an exception, and which they only would allow him to prove *aliunde*. See Durie, 1st July 1624. *Vol. I. Page* 12.

1679. *January* 22.—Sir Alexander Fraser of Doors against Sir James Hamilton, (30th July 1678.) The Lords having then ordained annualrent from the date of Sir James his father's bond till payment, Sir James presented a bill of suspension, and craved, since it was a double English bond, it might be regulated by the law of England; and so he might be no farther liable than in the double sum, which *ex eventu* here was less than the annualrents.

Answered,—If the *cursus usurarum* had been stopt by payment, before the interest swelled bigger than the double of the sum, then the debtor would have had his election, and would rather pay the annualrents than the full double bond. *Ergo, quem sequitur commodum, eundem debet et sequi incommodum;* and double English bonds, by our Scotch law, *ex quadam ἐπιεικεια, et moderatione juris*, are ever interpreted to be the principal sum and its annualrents; the double being a *pœna* with them, (when the canons of the Popish church discharged annualrents;) and with us, to exact it were usury. And though, by the Roman law, *l. 27 C. de Usur.* Justinian discharges *usuras currere ultra duplum sortis*, yet we have no such way *quo sistitur usurarum cursus*, with us. See anent the interpretation of English double bonds, Dury, *27th February* 1627, *Lawson.*

Notwithstanding whereof, this case being reported to the Lords, they sustained the calculation of annualrents only until the same amounted to the double of the sum advanced to and received by the debtor; and found the suspender, Sir James, was not liable to the annualrents which exceeded the said double bond: and which the Lords decided without so much as one contrary vote. *In dubiis, quod minimum, benignius, et levius debitori, id sequimur, L.* 9 *D. de R. J.* *Vol. I. Page* 35.

1679. *January* 23. George Young *against* John Hay and Andrew Ker.

In the wrongous imprisonment and oppression pursued by George Young, late bailie in Winchburgh, against Mr John Hay, sheriff-depute of Linlithgow, and Mr Andrew Ker his clerk; the Lords found the libel relevant, and proven by the defender's own answers, as much as might infer an arbitrary punishment; in so far as Woodcockdale confessed there was such an act in their shire, discharging any of the inhabitants of the sheriffdom to pursue before any other court, except themselves and the commissaries. And they found it an absurd act, and prejudicial to regalities; (yet it is known that several courts and judicatories in Scotland make such acts;) and that he justified and defended the fining of George Young in fifty pounds Scots, and his imprisoning him on that act. Therefore they rebuked him publicly, and ordained him, so soon as he went home, to raze said act out of the sheriff-court books. And fined him in L.100 Scots, to be given to George Young for his charges and expenses. *Sub velamine*

et prætextu officii judicem crimen committere is a greater crime than in another, says Bartolus. *Sub umbra juris scientiæ sæpe perniciose erratur, l.* 91, § 3, *D. de V. O.*

The libel concluded deprivations against the clerk, upon the 81st Act, Parl. 1540, imposing that penalty on clerks that refuse an extract of instruments taken in their hands. In this cause the Council was displeased with George Young; because, in purging the witnesses of partial counsel, it appeared they had got money; whereas it is allowed to give witnesses nothing till after they have deponed: and, though a party may lawfully bear his witnesses' expenses, yet here George had given some of them two dollars, which was thought exorbitant; albeit they had attended several Council days, and refused to come in without it; yet a caption could have forced them. See of witnesses' expenses, *June* 1672. *Vol. I. Page* 36.

Anent the Iniquity of Inferior Judges.

The Lords have found, that where the iniquity and partiality of an inferior judge, or clerk, is very gross and palpable, so that it looks like *dolus* or *lata culpa*, that they will sustain action, and will find such a judge or clerk liable for repayment of the sum so unjustly decerned. *Si dolo litem suam fecerit judex, tenetur parti læsæ in damnum et interesse, l. ult. de Extr. Cognit.* See Gayl. *de Arrestis Imper. c.* 14, *lib.* 1, *obs.* 153, *et lib.* 2, *obs.* 76. And I hear that the Lords lately found a sheriff liable to a debt for pronouncing an unjust decreet. *Vide tit. Dig. de Mag. Conveniendis.*

The Lords have lately permitted a pursuer to advocate his own cause upon iniquity done him. See *July* 1672, *Bell.* *Vol. I. Page* 37.

1679. *January* 25. Robert Campbell *against* Lady Cardross and her Husband.

Robert Campbell, as standing infeft in 13 oxengates of land in Strabrock, from Mr Peter Oliphant, pursues a reduction, against Lady Cardross and her Husband, of their rights of the same. Alleged,—They would not take a day in the reduction to produce, because all parties having interest were not called, *viz.* her sister, who was married to Lord Kilmawers, and was the other heir-portioner. Answered, 1*mo*,—No necessity to call her, because offered to prove, by Lady Cardross's oath, her sister was denuded in her favours, and so her interest ceased; and she was the sole heir of tailyie to her brother Sir William. 2*do*, Offered to call her to the next diet of the process, if needful.

The Lords, upon report, found, that of necessity she behoved to be called. *Vol. I. Page* 38.

1679. *January 25.* JAMES CARNEGY *against* The TOWN of BRECHEN.

JAMES Carnegy, writer in Edinburgh, pursuing the Town of Brechen for payment of an account of writings for them; it was ALLEGED, They had entered him in a piece of land held of them, and gave it him *gratis*, and so it must be presumed it was *intuitu* and in payment of this account.

The Lords repelled the allegeance and presumption. *Vol. I. Page* 38.

1679. *January 28.* MALCOM HENDERSON *against* JAMES BAYNES and OTHERS.

MALCOM Henderson having charged James Baynes, wright, and Others, for payment of the dues for their timber that stood in the Timber-house at Leith, whereof he was collector, and whereof there was a printed table, and two Acts of the Town Council of Edinburgh:

This being suspended, and their reasons reported to the Lords, they found that the suspenders are only liable in once payment of their dues by the first proclamation; but find that, after the second proclamation, which was in November 1677, they are liable in payment of their dues yearly. And repel the allegeance, that they had timber stolen out of the house, unless the suspenders will offer to prove that the charger, at the time of their putting in their timber to be kept in the house, granted receipt thereof, or that the timber was taken out with his knowledge; albeit the house was not then inclosed with a dike, as it is now. *Vol. I. Page* 38.

1679. *January 28.* NINIAN PATERSON *against* HART.

MR Ninian Paterson, minister at Liberton, pursues Hart, the messenger, for £100 Scots, as the growth of his glebe, laboured by the said Robert Hart in 1676.

The Lords, before answer, ordained Mr Ninian to prove how much increase and growth Hart had upon the glebe that year, and what he sold it for; and also, Hart to prove the expense he was at upon the seed, labouring, shearing, and other charges: and, after probation, they would modify accordingly.

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1679. *January 31.* JAMES ROCHEID *against* BORTHWICK.

MR James Rocheid, clerk of Edinburgh, against Borthwick his tenant in Inverleith. Mr James offered to prove, that, albeit the acres set in his tack were only designed forty-eight acres, yet that they were truly sixty acres, if right measured, and he ought to pay for them accordingly.

This being reported, the Lords refused a new measuring, and decerned him only to pay for them as they stood in his tack, it being taxative and not demonstrative, and they being commonly holden and reputed so many. *Vide infra, 9th November* 1682, [Historical Volume,] between thir parties. The Lords had done the same before, 16*th July* 1678, *Robertson:* See Durie, 1*st February* 1634, *Murray*; and Struv. *Syntagm. Jur. tom.* 1, *tit. de Contr. Empt. p.* 821. *Vol. I. Page* 39.

1679. *January* 31. DRUMMOND of RICCARTON *against* ————.

IN Drummond of Riccarton's case, the Lords found, where a bond of provision is given to a daughter, with this express condition, that, if she die unmarried, the sum shall return to the granter and his family; that she could do no gratuitous deed in prejudice of the foresaid quality in the bond, and that she might not evacuate the same by any voluntary assignation thereof: And found, that it was no necessary nor onerous cause that she made a mutual tailyie with another, and assigned it to him. *Vide supra, 25th January, Mr John Daes.* This decision drives them to marry.

In a substitution like this, in a bond of provision given to Mary Scot, Margerton's sister, she having assigned it, and afterwards dying unmarried, Sir John Nisbet and Sir G. Lockhart resolved, that she had no power voluntarily to assign it, in prejudice of the substitutes. See the contrary, in Durie, 8*th March* 1626, *Monro. Vide infra,* 1*st December* 1680, *Anderson.*

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1678 *and* 1679. DAVID FERGUSSON *against* SETON of CARISTON and the EARL of WINTON.

1678. *February* 14.—DAVID Fergusson in Kirkcaldy, a creditor and appriser of Seton of Cariston's estate, pursues a reduction and declarator, against Cariston and the Earl of Winton, of a comprising led by the Earl's grandfather, of the lands of Cariston, upon this ground, That it was a comprising kept up for the debtor's behoof; which was urged from thir conjectures and presumptions, *viz.* Cariston was a cadet of the family, married a cousin; the Earl, who comprised, was his tutor or curator, at least acted as such; and this apprising was in the debtor's own hands retired, without a right to it, and must presume payment and liberation. ANSWERED,—This Earl, at his grandfather's death, was left an infant, in 1650; his papers were squandered, &c.

The Lords, before answer, ordained Cariston and all others, who might give any light in this affair, to be examined how the said apprising came in the debtor's hands. Whereon Cariston, the Viscount of Kingston, who was the Earl's intromitting tutor, &c. were examined, and declared that they were given in to Mr William Syme in 1653, who was the Earl's ordinary advocate; and, he dying, Cariston borrowed them up from one Dalzeell, who had been

Mr William's servant; and, he also dying, Cariston kept them till he produced them in this action.

The Lords falling to advise thir oaths, Fergusson offered farther to prove, by the Earl's oath, that there was some trust, promise, or back-bond, for making that right forthcoming to Cariston's behoof, or his children; and that it was kept up only to hold off other creditors, and that Cariston chose rather to fall in his chief's hands than be in the reverence of strangers; and that he had Cariston's contract of marriage, in which either the Earl's goodsire dispones the lands apprised or his apprising, or consents as curator; in which case it must accresce to Cariston the minor, at least be presumed his, till the Earl, by a count and reckoning, make it appear he is nowise his debtor; at least they alleged he renounced his apprising in so far as extended to the jointure provided to the Lady by the contract-matrimonial. But this last alternative made against them; for that evinced the Earl designed not to quit the apprising any farther.

The Earl compeared, and, on oath, denied any trust; and, to his knowledge, the having of that contract of marriage or that ever he saw it. They interrogated him if he had searched for it? He declined to answer this; and, in truth, it were an intolerable labour for him to seek his vast charter-kist to pleasure them; neither uses he to do it himself, but only to employ others. *Vide supra, No. 615, 24th July 1677, Sibbald of Kair.——Advocates' MS. No. 725, folio 320.*

1679. *February* 1.—In the reduction pursued by David Fergusson against Seton of Carriston and the Earl of Winton, (14th Feb. 1678;) it was urged, in the Inner-House, that the comprising was retired, being produced by Carriston himself, and that *instrumentum apud debitorem repertum præsumit liberationem debiti, et pro cancellato habetur.* Sir G. Lockhart showed, how that brocard in law made but a presumptive probation at best, and that it held mainly in personal bonds, and other such writs whereon nothing had followed, but had little or no strength in comprisings, or other real rights, especially if infeftment had followed upon them, as in this case; because the giving up of the comprising, and its grounds and warrants, was not the *habilis modus* to denude the creditor, or to secure the debtor whose lands were apprised, since the seasine still remained in the register, and the apprising itself stood recorded, and the executions in the messenger's book, and the letters at the signet, and so might easily be made up. But, in either case, and even in personal rights themselves, the strength of the presumption arising from the foresaid maxim was totally elided by proving a positive way and manner *quomodo creditor desiit possidere*, and how the right came into the debtor's hands; it neither being by solution, nor other transaction, importing the consent of the creditor thereto. See Perez. *ad tit. C. de Solut.* § 16; Gayl. *lib. 2, Observ. 37.*

The Lords, when they came to peruse the depositions, were exceedingly stumbled, and ready to decide against the Earl; for there was only one witness, *viz.* the Viscount of Kingston, who deponed that the comprising in question was in the Earl's charter-chest in his minority; and Carriston deponed, most supinely, that he neither remembered what tocher he got, nor how, nor by whom it was paid. So some suspected a conveyance. Some of the Lords inclined to let it subsist as a debt, but not to take away the estate, as an elapsed apprising. Sir G. Lockhart was of opinion, that the comprising should subsist against the debtor Carriston; because he, by his oath, had declared he had got

it without payment, but not against Carriston's creditors, who ought all to be preferred to it, since their debtor's oath ought not to prejudge them.

The Lords referred to the Lords Forret and Pitmedden to settle and agree the parties: who did so: and Winton purchased in Fergusson's apprising, and got an abatement of seven years' annualrent, and gave him bond for the remainder. See 21*st June* 1677, *f.* 286, *in fine :—Item Massuer. prac. forens. tit.* 19, *de Præsumpt. p.* 176. *Vol. I. Page* 89.

ANENT MOVEABLES.

THERE is an heritable bond due to a minor; his tutor uses requisition; the minor dies; a competition falls in betwixt the minor's heir, and his executors, who allege the sum belongs to them, because it was made moveable by requisition. The heir says, the tutor's deed cannot wrong him; for, 1*mo*, He could not uplift an heritable sum (especially if infeftment followed on it, for that makes it like to lands,) *sine decreto judicis interposito*. 2*do*, If he had lifted it, he was obliged to have reëmployed it on heritable security again, in which case it would have belonged to the heir.

It would be considered whether it was a redeemable or irredeemable right of lands. 2*do*, If there was necessity to call for it, either because the minor stood in need of it, or that the party debtor was turning insufficient, or that a better occasion offered. The best lawyers were divided upon this question. If he was a pupil within 12 or 14, who can give no consent, some think the tutor alone cannot alter it; but, if he be under curatory, it is somewhat more questionable. See the case, *Park* against *the Earl of Wigton, &c.* (which agrees with this case,) where a moveable bond, surrogated by a tutor in place of an heritable, *sapit naturam prioris*, and which the Lords found on the 21*st June* 1677, in that case. *Vol. I. Page* 40.

1679. *February* 1. ANENT the TOWN of EDINBURGH'S IMPOSITION on ALE.

I HEARD that the Lords had found the Town of Edinburgh's imposition of two pennies on the pint of ale extended only to what was brewed, vended, and consumed within the Town of Edinburgh's liberties, taking these words, *brewing* and *vending*, *conjunctive* and not *disjunctive*. What was brewed therein, but was consumed in the shire, without their liberties, they found the imposition did not reach to that, though the words of their gift from the King be copulative. *Vol. I. Page* 40.

1679. *February* 4. THE PEWTERERS of EDINBURGH *against* The PLUMBERS.

THE Pewterers of Edinburgh raise a declarator against the Plumbers, that they have as good right to work in lead, as making pipes, thatching platforms, &c. as the Plumbers. ALLEGED, 1*mo*,—The Lords have found the Plumbers a distinct trade. (See Feb. 1676, No. 469.) 2*do*, It is for the good of the king-

dom, to have sundry different trades. *3tio*, By Act of Parliament 1663, the Pewterers should not meddle with lead. *4to*, The whole deacons have given a decreet in favours of the Plumbers. ANSWERED,—The decreet of the other deacons is given *a judicibus pedaneis*, and is of no moment. Some lead is always necessary to make tin work, in ley metal, such as stoups, chamberpots, &c., the standard and quantity of which mixture is decerned by an Act of the Burrows. The Act 1663 hinders them not to work in lead, but only to mix it with foreign tin. There is no mystery in plumbing, but easily any pewterer may do it; yet *stannum et plumbum* are different. The Pewterers are in the seal of cause with the Hammermen; the Plumbers are in none, but have a wheel-barrow for their essay. Different trades, where they are able to subsist, are useful; but, in Scotland, plumbers cannot subsist upon their work, as a distinct trade, there being little to do; only our curiosity is increasing daily.

This being reported, the Lords, before answer, ordained the Plumbers to condescend and prove, that, since their admission and incorporating of them with the Wrights and Masons, they were used, by and of themselves, to work in lead as a distinct trade and employment, and were in use to admit of apprentices, and to do such other things as are proper for a distinct trade and employment; and to condescend, and prove the time of their assumption and incorporation to be a distinct trade. *Vol. I. Page* 40.

ANENT PROOF by WITNESSES.

INTROMISSION with moveable goods, or with maills and duties, may be proven by witnesses, though they be of never so great a value; but not intromission with sums of money, which require a more exact probation, *scripto et juramento*, that the Judge may exactly know *quo animo* it was uplifted, and whether the uplifter had any right thereto or not. *Vol. I. Page* 40.

ANENT BONDS of PROVISION and TESTAMENTS.

ONE makes a testament, and leaves legacies, and afterwards grants a bond of provision to his children: the bond of provision will affect the moveables preferably to the legatars, because *ambulatoria est hominis voluntas*; and here *posterius derogat prioribus*; and a testament is *sua naturâ* revocable, *vel tacite vel expresse*, and is only *sententia de eo quod quis post mortem suam fieri velit*. But, if the bond of provision be on death-bed, it only affects the dead's part.
Vol. I. Page 40.

1679. *February* 7. THOMAS CRAWFURD *against* The TOWN of EDINBURGH.

THOMAS Crawfurd, late Bailie of Edinburgh, against the Town of Edinburgh, for payment of a sum as the price of one of the tenements whereon the Tron-church is now built, and whereunto he has right as donatar to the bastardy of the last heritor thereof.

The Lords ordained the Town of Edinburgh to pay him the said money up-

on his discharge and absolute warrandice; albeit his right was very defective, and he had only the gift of one of their bastardies, whereas there were four of those brethren, called Oliphants, that had right to the price, as appeared by the Act of the Town-Council. And whereas Thomas contended that he needed give no warrandice, because the Town was secured by the prescription of forty years' peaceable possession, the bargain being in 1638, the Lords repelled this upon a report of Craigie's. *Vol. I. Page* 41.

1671, *and* 1679. JANET KELLY, Lady Eistbarnes, *against* The TENANTS of EISTBARNES.

1671. *December* 5.—THIS was an action for poinding of the ground upon a bond of provision, and infeftment, and annualrent, relative to her contract of marriage; wherein compeared Mr Laurence Charteris, who had comprised thir lands, and ALLEGED, No process at her instance, because he offered him to prove that Mr Cornelius Inglis, granter of the bond whereon the pursuer's infeftment followed, was denuded of the right of property of the lands in favours of Mr Patrick Inglis his son; and the said Mr Patrick infeft before the pursuer's infeftment of annualrent; and Mr Laurence has comprised the son's right. *(Vide infra*, in June 1677, *numero* 583.*)* See *7th February* 1679, *Eistbarnes' Creditors* and the *Lady's Executors.*

REPLIED, for the pursuer,—1*mo*, Albeit the defunct Mr Cornelius had been denuded of the property in favours of his son, yet the son's infeftment was base, and never clad with possession till after the Lady's infeftment. 2*do*, The pretended right being a disposition by a father to a son, without any adequate price, and after the Lady's contract of marriage, whereto her bond of provision is relative, the son can never quarrel the Lady's right, because, by accepting the said disposition, she will be liable, as successor *titulo lucrativo*, to fulfil his father's obligement; and the father, by granting the said infeftment to his son, was noway incapacitated to give his lady an infeftment, depending on a preceding most onerous cause, her contract of marriage, against which her son's infeftment cannot be obtruded.

DUPLIED,—They offer to prove the son was infeft, and in possession before the Lady's infeftment. 2*do*, The son's infeftment proceeding upon a disposition bearing to have been granted for causes onerous, is sufficient *quoad* a compriser, who, being a singular successor, is not obliged to debate whether the causes were onerous or not.

TRIPLIED,—The son's infeftment could not be clad with possession before the Lady's, because it is dated only in March 1669; and, the rent being victual, it is payable betwixt Yule and Candlemas, and the Lady's infeftment is in December, that same year, and so the son could not be in possession. 2*do*, As to the comprising, it is led against the son after the Lady's infeftment; and albeit the compriser were infeft, (as is denied,) yet the right, made by the father to the son without an adequate price, is such a deed as makes him liable *ut successor titulo lucrativo*. And he not being denuded before the Lady's infeftment, which is for implement of her contract of marriage, anterior to the son's

infeftment, and so he cannot quarrel the Lady's infeftment; *ergo*, no more can the compriser, seeing the son's right cannot be transmitted but *cum sua conditione et causa:* and the compriser can be in no better case nor his author, who could never prejudge the Lady's right, as is already shown. *3tio*, Not only is the son's infeftment base, but the father continued in the possession; and any possession the son had was with the father *in familia*, and was the same before the right as after; and, being *tanquam possessio hæredis* after his father's decease, no person, deriving right from the son, can quarrel that deed, which, in law, he would be liable to fulfil.

QUADRUPLIED,—The compriser must yet be preferred; because, *1mo*, It is sufficient to him to say the son's infeftment bears, in the narrative, to be for onerous causes; which cannot be quarrelled, unless the contrary were proven *scripto vel juramento*. *2do*, Offers to prove the compriser stands infeft before citation or intenting action at the Lady's instance; and so the son was denuded *antequam res fuit litigiosa*. *3tio*, Offers to prove the compriser was infeft before the father's decease, and so the son was denuded before he could succeed to his father. *4to*, Offers to prove the debts and sums of money which be the cause of the disposition to the son, are adequate and equivalent to the worth of the lands disponed.

There being an *avisandum* of this dispute, the Lords found the defence of *successor lucrativo*, for debarring the son from quarrelling his mother's liferent, was personal; and, though it would have met himself, yet it will not meet thir comprisers, who succeed in his right *ex titulo singulari*. As also, recommended to my Lord Craigie, Ordinary, to cause the defenders' procurators condescend on the manner of possession which the son had after the said disposition, and hear them thereon; and whether the son, before the disposition, was intrusted by his father with the managing his estate and lifting his rents.

Upon this interlocutor, the compriser craved a diligence against the son for producing his right, seeing he could not be master of it. The Lords refuse to grant diligence, and decern in favours of the Lady, in respect the appriser produceth not his author the son's right, without which the appriser had no interest; but, if he produce and condescend *ut supra*, within three or four days, and produce his infeftment on his comprising, he shall be heard.

Then compearance was made for the son, who ALLEGED,—He must be preferred to the Lady, and that he has no necessity to produce his right *statim* because he is called. *2do*, Offers to prove the father is denuded of the property in his favours, and he standing infeft before the Lady's infeftment; and so is not obliged to debate whether the onerous causes be adequate or no.

REPLIED,—They oppone the former interlocutor, whereby the allegeance proponed for the appriser was repelled on that head and consideration, that the son's right was not produced. *2do*, The son being out of the country, *animo remanendi*, there is no procuratory produced. *3tio*, The son is only called as a possessor and intromitter; but, if he compete with the pursuer upon a right, it ought to be produced. *4to*, *Esto* it were produced, yet she must be preferred, because her bond and infeftment is expressly relative to her contract of marriage, which is long anterior to the son's pretended right; which must be good, especially against the son, *qui est alioqui successurus;* and his accepting this right is *præceptio hæreditatis*, and so makes him liable *tanquam successor titulo lucrativo post contractum debitum*, seeing the son's right is not for onerous causes.

And it is frivolous to contend that he is not obliged to condescend on onerous causes, where the pursuer her right not only is founded on her anterior contract of marriage, but for a most onerous cause,—having brought above 20,000 merks of tocher with her. And the son's right was sinistrously impetrated, when the father was valetudinary, and now most unnaturally obtruded by him against his mother's jointure. As also, it was not her fault, but her husband's and her son's, that she was not better served of her liferent; for which it were hugely unjust to make her smart, seeing no action would have been sustained at her instance against her husband. And though she has seven chalders of victual in property, whereon it may be pretended she may live; yet that she had not of her husband, but as heir to her brother.

This going to *avisandum*, the Lords found the allegeance proponed for the defender, bearing that his father was denuded of the right of the lands, in favours of him his son, for an onerous cause adequate to the worth of the lands, and in possession before the pursuer's infeftment, relevant; and assign the 20th of this month to prove, reserving *contra producenda.*

Then the pursuer ALLEGED,—The son's infeftment being only base, and not clad with a possession distinct and separate from his father's, and continuing *in familia*, albeit it were for adequate sums, yet being *inter conjunctas*, and not made public; the lady's infeftment, depending on her contract of marriage, which is, of its own nature, a cause most onerous, public, and favourable, must be preferred.

ANSWERED,—The son's right is not only for sums adequate, but also is clothed with possession distinct and separate, *videlicet*, payment of maills and duties, by tenants to him, and discharges given by him, in his own name, to them, *quoad* such lands as were laboured and possessed by tenants, and by labouring the lands not set to tenants with his own goods.

REPLIED,—Labouring with his own goods, which were formerly his father's goods, *non relevat* to infer possession, the son staying in family with the father, unless he will condescend and prove legal deeds, whereby the father was *habili modo* denuded, and the son invested with the *dominium* and possession of the said goods.

DUPLIED,—Offers to prove he laboured the ground with his own goods *ut supra*, and that he had right, by disposition and instruments of possession conform, as to such goods which were formerly his father's.

The Lords adhere to their former interlocutor, *viz.* find the son's right before the relict's infeftment relevant, if for an adequate cause and in possession conform. And find the possession qualified by the son, *viz.* uplifting maills and duties from the tenants, giving discharges in his own name of such lands as were possessed by tenants, and by labouring the lands not set to tenants with his own goods; and that the goods which formerly did belong to his father were disponed to him, and an instrument of possession conform, before the lady's infeftment,—relevant to be proven, thus: *viz.* the onerous causes *scripto*, and the uplifting the duties and labouring the ground *prout de jure*, and the right and possession of the goods from the father *scripto:* reserving to the Lords' consideration, after probation, how far the son's right and possession shall operate against the pursuer's right, he being *in familia* with his father for the time.

Advocates' MS. No. 282, folio 118.

1679. *February* 7.—The Creditors of Mr Patrick Inglis of Eastbarns were

preferred to the executors of the Lady Eastbarns, his mother, *quoad* all the lands disponed to Mr Patrick by his father. See 5th December 1671, [*supra.*]
Vol. I. Page 41.

ANENT the CUTTING of WOODS.

QUÆR. if a donatar to a ward or a liferent escheat may cut a whole wood, and apply the price of it to himself. Some think, if it be *sylva cædua*, he may cut it in haggs,—*Vid. L.* 30 *D. de V. S. ibique interpretes.* But if it be a forest, he cannot otherwise cut it than the heritor was in use to do, or for the use of the ground, to repair tenants' houses, &c. or to sned them. This may also be demanded concerning a liferenter or wadsetter. See Craig, p. 218, Stair, *tit.* 14, § 23. *Vol. I. Page* 41.

ANENT REMOVING WADSETTERS.

WHEN one would take the possession from a wadsetter upon the 62d Act Parliament 1661, he should offer caution, besides his own bond; and he should warn the wadsetter, forty days preceding Whitsunday, to remove, in the same way as one would do with his tenant. See 14*th June* 1671, *Lord Lovat.*
Vol. I. Page 41.

1699. *February* 7. The CREDITORS of RUTHVEN of DUNGLASS competing.

IN the case of the competition of the Creditors of Ruthven of Dunglass, between an infeftment and an apprising; I hear that the Lords found, where a bond which is the ground of one's infeftment, is prior to a comprising and the complete diligence following thereupon, and that the party is infeft upon that bond before the compriser is infeft; that this is sufficient to bring him in *pari passu* with the appriser. As also it was again found in the case of *William Maxwell* against *Sir David Dunbar.* *Vol. I. Page* 41.

1679. *February* 8. ANABELL, ALISON, BESSIE, and JANE LOTHIANS *against* KATHARINE LOTHIAN and MATTHEW RAMSAY, her Husband.

[See the prior part of this Case, Dictionary, p. 5649.]

IN the action (mentioned 15th June 1678,) pursued by Lothians against Mr Matthew Ramsay and his wife; the probation anent the death-bed being this day advised by the Lords, they found the same fully proven, and therefore reduced the disposition. They craved the Lords would also reduce the disposition, which the pursuers had got, of that same date, from the same author, that there might be an equality and a *collatio bonorum.*

This the Lords refused, they not having so much as raised a reduction of it; but reserved it to them as accords. *Vol. I. Page* 41.

1679. *February* 11. ARTHUR FORBES *against* The MASTER of SALTON.

ARTHUR Forbes his cause (*vide Dec.* 1672, *No.* 377 ; *vol. II. p.* 689,) against the Master of Salton was decided; and the Lords found the right standing in late Sir Charles Erskine, Lord Lyon, his person, was but a trust to Salton's behoof. But his oath taken by Newbyth bore, that it was to his own behoof: which seems to interfere. *Vol. I. Page* 41.

1679. *February* 11. BRUCE of BROOMHALL *against* the CREDITORS of MORRISON of DARSIE.

The competition of Bruce of Broomhall and the Creditors of Morrison of Darsie was decided. *Vol. I. Page* 41.

1679. *February* 18. SIR ROBERT SINCLAIR *against* HOME of WEDDERBURN.

SIR Robert Sinclair's cause with Home of Wedderburn was this day determined against him, and his comprising of the teinds reduced *funditus*, because the decreet, whereupon it proceeded, was extracted before the writs produced for Wedderburn were advised. Sir Robert said, In Sir John Gilmor's time he would not have lost the interlocutor; and he hoped to see such another president ere he died. *Vol. I. Page* 42.

1677, 1678, 1679. SIR ALEXANDER FALCONER of GLENFARQUHAR *against* SIBBALD of KAIR.

1677. *July* 24. SIBBALD of Kair raises a declarator against Sir Alexander Falconer of Glenfarquhar, to hear and see it found and declared, that the gift of his ward and marriage was taken by Gideon and Harry Guthries, his tutors and overseers, and was transacted by them with Sir C. Erskin, Lord Lyon, and consequently must be presumed to be done to his own behoof,—see Dury, 18*th July* 1635, *Edmiston;* and thereafter that they gave up the assignation they had gotten to it, and the Lyon gave a new assignation in favours of Glenfarquhar; with many other circumstances of the fraud and false conveyance, which see in the informations beside me; and therefore a bill was given in to the Lords, craving that my Lord Lyon might be examined *ex officio nobili*, whether there was not a prior assignation to the Guthries; and if it was not in trust to the minor's behoof; and was not retired and given back to the Lyon, and he thereon gave this second and new assignation to Glenfarquhar, or old Sir David Falconer, &c. anent their knowledge of it.

The Lords refused the desire of this bill, in regard Glenfarquhar being a sin-

gular successor and assignee, his right could not be taken away by depositions of witnesses or by his cedent's oath; unless it were proven to be to his cedent's behoof, or without onerous causes: and writ could only be taken away by writ. And therefore refused to examine the Lyon *ex officio*, unless we could say that we had rendered it litigious against the Lyon, by executing a summons before the date of this assignation to Glenfarquhar, for declaring that the gift was already assigned to the Guthries, for the pupil's own behoof. After which citation they found the Lyon could do nothing in prejudice of that intimated action *lite pendente*. But we were not able to subsume on any such declarator executed against the Lyon before his assignation to Glenfarquhar.

This was very hard and strict usage, considering the pregnant concurring qualifications of trinqueting and base indirect dealing. And the Lords, on less motives, have been oft induced to examine witnesses *ex officio nobili;* but they keep this *officium* of theirs as a screen to palliate their arbitrariness, to grant it or not as they favour. See Dury and Hadington, 1*st March* 1623, *Williamson* and *Law*.

This same session, in the end of it, the Lords refused to grant commission for examining Doctor Frazer, who had assigned a bond of Sir James Hamilton's father to Burnet of Leyes; though Sir James produced sundry little schedules, under the Doctor's hand, insinuating all the money contained in that bond was not then advanced to Sir James his father. Yet, in this other process, anent the modification of the avail of the marriage, we obtained, for the vassal defender, a joint probation of the rent of the lands and the value of his estate, beside the burdens condescended on. Whereas, in strict law and form, the donatar to the ward ought to have the sole probation of the rents of the land.

Advocates' MS. No. 615, *folio* 295.

1678. *February* 26.—This day the declarator pursued by Falconer of Glenfarquhar against Sibbald of Kair, anent the avail of his marriage, (*de quo vide supra*, No. 615,) was advised by the Lords; as also our declarator of trust against Glenfarquhar, whose oath, they found, did not prove any prior assignation: and having considered the probation led upon the rent of the lands of Kair, belonging to the minor, and any other estate he had belonging to him, which was in all betwixt sixteen and seventeen chalders of victual; as also the burdens and incumbrances affecting the same or the minor, whether personal or real, which were betwixt 7000 or 8000 merks, and more; they modified 3000 merks for the avail of his marriage, payable presently or next term, he being past fourteen.

This modification was very reasonable and low. *Vide supra, folio* 151 *et seq. Mr George Gibsone* against *Janet Ramsay*. Newton removed during the advising. In regard the donatar is liable in an aliment to the minor, by act in 1491, we thereon craved compensation *pro tanto:* but the Lords would not receive it here, but ordained us to pursue and liquidate it by way of action. *Quæritur* if Glenfarquhar will be liable for the year's aliment preceding the years of his assignation to the donatry from the Lyon.

Advocates' MS. No. 729, *folio* 320.

1679. *February* 19.—Sir Alexander Falconer of Glenfarquhar his declarator against Sibbald of Kair was called, wherein he craved to be free of the aliment, as donatar to his ward and marriage:—1*mo*, Because the mother had alimented

him already; *2do*, She had intromitted with as much of the rents of Kair as would compense it; *3tio*, Before 1676, he could not be liable, that being the date of his assignation to the gift of the ward from the deceased Sir Charles Erskine, Lord Lyon, but only for the years since; *4to*, For years posterior he cannot be decerned in any aliment, because he is willing to entertain the minor at his own house, and he will take his custody.

ANSWERED,—The entertainment which a superior and his donatar owe to the ward-vassal is more than a mere aliment; for the 25th Act Parliament 1491 requires he be brought up according to his quality and the condition of the fee; so that it is both more liberal and large than a mere *victus et amictus*. The mother's entertainment can never be supposed to have been a donation *ex pietate materna;* because, besides that she had little or no jointure to do it on, she advanced it *intuitu* of repetition, knowing that her son had right to an aliment from the donatar to his ward; and it is ridiculous to think that she minded to compliment the donatar. And though the wardator be already alimented for all the years past, yet that can be no discharge to the donatar of it, unless he can say he was alimented by him. And though his mother's intromitting with as much of the rents as will pay it, is not relevant against him, yet, *1mo*, Her said intromission is denied; *2do*, She did it by virtue of a right, *viz.* a decreet-arbitral, wherein Glenfarquhar himself is one of the judges; *3tio*, The time of the said pretended intromission, she was clothed with a husband, *viz.* Robert Arbuthnot; and so she cannot be liable, unless they prove that she represents him by some passive title. As to the 3d, This pursuer must be liable for years preceding his assignation, because the minor's aliment is *debitum fundi, et transit ad singulares successores*; and his author's gift is expressly burdened and clogged with it; and so Glenfarquhar, seeing it *in grœmio juris*, could not be ignorant of it. To the 4th, The donatar, by our law, hath not the custody of the minor's person; and the donatar's offer to entertain him with himself does not liberate, especially where the minor is sixteen years of age, and at the College. What! would Glenfarquhar teach him to keep his sheep? See Stair, *tit.* 14, Anent the Keeping of the Person of the Minor.

See 26th February 1678, where the marriage is modified and decerned. But being charged for payment, we contended it was not payable till the entry of the heir, which is his age of twenty-one years complete; for, though *cessit dies obligationis, tamen nondum venit dies, nequit exigi*; for wherewith shall he pay the avail of his marriage when he is not in possession? And therefore I find Balfour, *tit. Marriage of Heirs, C.* 76, telling us, that the Lords decided the single avail of the marriage not to be due till the entry of the heir: as also, that there can be no non-entry craved, so long as lands are in ward, but that ward stops it. See Stair, *tit.* 14, and Craigie, in his Collection of *Pract. v. Maritatio et v. Non-entry.* As to alimenting, *quo animo* it is done,—see *L.* 34 *D. de Negot. Gest.* 1*st February* 1672, *Guthrie;* and 3*d January* 1679, *Deas.* And I hear lately, that in *Mr John Ellis's* case against the *Countess of Dirleton* and *Mr Dalmahoy*, the Lords found, where one conjunct person had alimented another, without paction or agreement, (where the persons were of that age as were capable to make it,) they could not thereafter pursue for repetition of that aliment given.

This debate being reported to the Lords, they sustained the pursuit against the defender, for bygone years only since the defender's right of assignation from the late Lord Lyon, reserving action to the pursuer against the for-

ner donatars for three years preceding; and sustain the defence, that, as to the years since the expiring of pupillarity, the pursuer was alimented freely by the mother, without any paction. And, as to the years during the pupillarity, find the defence relevant, that the mother intromitted with as much of the rents of the ward-lands as the aliment would extend to; and sustain an aliment to the pursuer in time coming, according to his age and condition; and remit to the Ordinary to consider the pursuer's condition, and to modify the aliment accordingly.

On a second report, the 25th of February, the Lords adhered to their former interlocutor, and find the donatar not liable for alimenting, after the expiring of the pupillarity, in case the minor was alimented freely by the mother, without any paction: and find thir defences relevant *separatim*, *viz.* that the aliment was discharged, or that the mother or father-in-law intromitted with as much as will satisfy the aliment; or that there was a debt due to the minor, out of which he might have been alimented *aliunde*. And,—before answer to the other allegeance, that the estate was burdened with a liferent and wadset, upon a right from the grandfather, whom the minor represents, which exhausted the whole rent of the lands,—ordain the intromission of the liferenter and wadsetter to be proven.

Then, on the 27th February, upon a bill given in by Sibbald of Kair, the Lords adhered to their former interlocutor, and remitted to Forret to consider the condescendence of the rent of the lands, and the burdens affecting them, to hear the parties' procurators thereon, and to modify the aliment as he shall find just: which he modified to L.100 Scots yearly, during the pupillarity before fourteen, and L.200 after that, conditionally that the foresaid points were proven.

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1679. *February* 22. Robert M'Gill of Fingask *against* Home of Wedderburn.

Mr Robert M'Gill of Fingask obtaining a decreet against Home of Wedderburn, for payment of a debt contained in his father and goodsire's bond, he suspends, and offers to prove paid, and craves an incident; and when we are circumducing the term, he produces some discharges of the bygone annualrents, amounting only to a small sum. We, not being willing to delay ourselves, offer immediately to allow them, and deduce. This was refused; because, in form, wherever there is a production made of writs for proving, there must be an *avisandum* made with the cause to the Inner-House, and they must be there advised; and one will not get a decreet though he offer instantly to allow all they seek; which seems strange: and yet it is affirmed it was so decided by the Lords in the case of *Kinfauns* and one *Couper*, lately. *Vol. I. Page* 44.

Anent Apparent Heirs.

They affirm that an apparent heir may neither pursue a reduction *ex capite lecti*, (yet his creditors may do it, to remove impediments out of their way,) nor yet an improbation.

It was queried, if an apparent heir shall get a comprising gifted to him, if that

right be redeemable from him by the defunct's creditors within ten years after his acquisition of it, by 62d Act Parliament 1661; for that act seems only to allow the redeeming of such rights as he shall acquire with money; for it speaks of repaying him the sums for which he bought and purchased it; and the case of donation, (as being infrequent in this uncharitable age,) seems not to be provided for, but to be a *casus non cogitatus*, wherein the statute is out, and which was not thought on; and so *casus omissus habetur pro expresse et de industria omisso*; and *statuta*, being *strictissimi juris*, cannot be extended *de casu in casum*. Some think the act, though it ought, yet in strictness it will not reach this case. See some questions at the end of February 1680, and Stair, *tit.* 24; where an heir getting a comprising *gratis* must be paid the whole sums.

A mother giving her daughter a tocher, and taking from her a discharge of all she can ask or crave, by her father or goodsire's decease, as heir to them, (there being only daughters,) or any other manner of way; *quær.* if the accepting of this tocher, and renouncing the succession in manner foresaid, will be a *gestio pro hærede*, and infer a passive title, yea or not. Some affirm it will, because she gets money to do it. But this were exceeding hard. How far an apparent heir, renouncing to be heir for money, is liable, see Stair, *tit.* 29.

What if an apparent heir renounce the reversion of the apprising, or his right of the lands apprised, and get a sum of money for it. The Lords have taken a very rational and just way in this; for, if the legal of the apprising was not expired, or if there was any right to the lands standing in the apparent heir's person, and he quit that for money, then it is a behaviour; but if the legal be expired, and he gets it merely for his kindness and good will, that binds no representation on him. See Dury, *27th January* 1636, *Straiton*; 10*th February* 1642, *Johnston*. *Vol. I. Page* 44.

Anent Equality of Punishments.

Doctor Jermyn, in his Commentary on the Proverbs, c. 16, v. 11, cites to this purpose an apposite saying of St Chrysostom on the 95th Psalm:—*Cum punit Deus trutinat ultionem, ut congruens sit delictis.* And the English *Magna Charta, anno* 9 *Henr.* III. *c.* 14,—"No man should be amerced but after the quantity of his offence." And Draco's laws, to this hour, stand condemned for making one punishment for all faults; though the Stoics made all errors equal. *Vol. I. Page* 45.

1679. *February* 28. Anent Recognition.

Robert Graham, Provost of Dumfries, a man in great reputation for wealth as a drover, being broken, this day his escheat is gifted to the Earl of Dundonald, the President, Craigie, &c. *primo loco*, for payment of their debts. They also got the gift of the recognition of his lands, which he had made to recognosce, by taking a base infeftment after he was bankrupt; which will occasion a pretty debate in the declarator of recognition, whether or no such a fraudulent deed can make the lands recognize, so as to prejudge his creditors; and if this will

fall under the compass of the 18th Act Parliament 1621. He could not have disponed validly then; *ergo*, neither lose them by delinquency, *tantum contrahendo quantum delinquendo*. Many will be great losers by him. See Durie, 10*th March* 1627, *L. Balmerino*; 16*th Dec.* 1680, *Hay*. *Vol. I. Page* 45.

Anent a Skipper's Liability for Damaged Goods.

If a shipmaster suffer merchant-goods, as cloths or the like, to be eaten by rats, he will be liable to the merchant for the damage, unless he prove he had cats in his ship. This is expressly determined by Cristoph. Crusius *de Judiciis Delictorum*, *p.* 421. See also B. Straccha *de Nautis*, &c. If their goods be burnt in the ship by negligence, or spoiled with water, or rent and torn by stowing too much, the skipper is liable *ex edicto*, *Nautæ*, *caupones*, *stabularii*; and Act 14, Parl. 2, J. III. See 7*th Nov.* 1677, *Laurie*; and Stair, *tit.* 10. *Vol. I. Page* 45.

Anent the Effect of Back-bonds as to Succession in Moveables.

Where a back-bond is granted by an appriser, declaring so much of the sums of the apprising to be to the behoof of another,—if that other, to whom the back-bond is granted, dies, *quær.* whether it falls to his heir or executor; and must be confirmed, as being moveable, and a mere personal obligement to denude, or if it must be conveyed by a general service, as surrogated in place of an heritable right, and so *illius naturam assumit, induit et sapit.* Stair, *tit.* 20, compares a back-bond with a reversion; now reversions are heritable. *Vol. I. Page* 46.

1679. *February* 28. Seton of Pitmedden *against* Seton of Minnas.

In Pitmedden his action against Seton of Minnas, I hear that the Lords found a discharge given to intromitting tutors, did liberate all the rest from omissions, even those who were not mentioned in the discharge. *Vol. I. Page* 46.

Anent the Arrestment of Ministers' Stipends.

It was questioned among the Lords, whether ministers' stipends are arrestable. *Ratio dubitandi* is, because they seem only in some manner to be alimentary, and some of them scarce bear the proportion of an aliment. *Præses Everhardus*, in his *Loci Legal. loc.* 56, *a milite armatæ militiæ ad militem cœlestis militiæ*, is clear to exeme *stipendia clericorum* from legal distress. *Vol. I. Page* 46.

Anent Remissions.

By Act 68, Parl. 1503; Act 118, Parl. 1540; Act 154, Parl. 1592, and sundry other Acts, our Kings are bound up and discharged to grant remissions

for murder, fire-raising, &c. which I considered on the questioning the Earl of Danby's remission in England. With us, remissions commonly go through all the seals, but they may also pass the broad seal *per saltum*.

Vol. I. Page 46.

Anent Warrandice from Fact and Deed.

In a disposition, one gives warrandice from his fact and deed; thereafter, by committing adultery, his wife gets a decreet of divorce against him, and then has access to her jointure, as if he were naturally dead, and excludes the party who got the right. He pursues upon this as a contravention.

Alleged,—Warrandice is only incurred by legal deeds, as by a contrary disposition and double rights, and not by such a natural fact of unclean heartsomeness. Yet I hear, the Lords, in the time of the English usurpation, in the case of Sir George Home of Manderston, found the warrandice equally incurred by both. Likeas the infeftment given to the wife, though it was anterior, yet it was a fact and deed: and it is always fit to explain the clause of warrandice, That he has not done, nor shall do; and so it comprehends both commissions and omissions, *viz.* that he shall not do; for *tantum quis facit delinquendo quantum contrahendo*. See M'Keinzie's Obs. on the Act 1621, Wissembac, *ad ll.* 169, 189, *and* 240, *de V. S.* But what if the exigetic clause of warrandice only say, that he hath not granted any assignation or discharge of the premises; whether is that restrictive, or would it extend to this case?

Vol. I. Page 46.

Anent Dispositions of Ward-lands.

In disponing ward-lands, there should either not be two obligements to infeft *a me* and *de me*, for fear of recognition, but only one; or else the first should not be taken to be holden blench but feu, since ward, by Act of Parliament, may be turned to feu but not to blench. *Vol. I. Page* 46.

Anent Registration of Writs, and Publication of Inhibitions.

In the registration of writs, by law ordained to be registrate, some upon fifteen days, as hornings,—some on forty, as inhibitions, &c.,—some on sixty, as seasines,—*quær.* whether must the fifteen, the forty, or the sixty days be counted as beginning to run from the first execution, or last, of a horning, inhibition, or seasine, in more lands. As, for instance, a creditor inhibits the party personally, or at his dwelling-house; and then, ten, twelve, or twenty days thereafter, publishes the inhibition at the market-cross; whether must it be registrate within forty days of the first execution, (which may scarce be got returned from remote places,) or within forty days of the publication. *Item*, If it be a nullity and informality to publish an inhibition at the market-cross, before it be executed against the party. It seems it is, as if one should denounce lands to be apprised without a charge of horning or a search for moveables. Yet one may think it more convenient to inhibit first at the market-cross, lest the party inhibited should, *medio tempore*, before it is published at the market,

cross, go and dispone; which makes another doubt if that disposition be reducible.

See 14*th June* 1670, *Blackbaronie*; 20*th February* 1680, *Bothwell*; and Wesembac. *ad l.* 133, *de V. S. Dies termini non computantur in termino.*

Vol. I. Page 46.

Anent Advocations.

Balfour, in his *Pract. tit.* Advocation, observes, that litiscontestation stops advocation, and that it ought to be reduced, and not advocated. See 20*th February* 1680, *Aitken.* But, for eluding this, some raise a blank reduction of the Act of Litiscontestation, and repeat their reasons of advocation, as if they were reasons of reduction, and so get it received; whereas they should go on *in communi formâ*, in discussing their reduction. *Vol. I. Page* 46.

Anent Taxations.

Taxations, ordinarily, by the style of the Acts of Parliament, or convention imposing them, expire, if not pursued for within three years; which is just, but has no place but where the Act provides it. See Stair, *tit.* Prescription.

Vol. I. Page 46.

Anent Legatars.

Legatars, that cannot otherwise come by payment, have been advised to confirm a testament, and get themselves named executors *qua* legatars; which may afford a title to pursue as well as a confirmation *qua* executor-creditor.

Vol. I. Page 46.

Carsan *against* Maxwell.

In Carsan and Maxwell's affair, alleged, 1*mo*, The principal sum is not arrestable, because infeftment is taken, though not on it, yet upon the bond of corroboration. 2*do*, The payments must be ascribed, first to exhaust the principal sum, which is *durior sors debitori*, it bearing annualrent, and not to exhaust the annualrents; and so the interest will be still due, and so arrestable. See 31*st January* 1671, *Telfer.* *Vol. I. Page* 47.

Anent the Quorum of the Lords.

There being but ten Lords, whereof one behoved to sit in the Outer-House; the fulness of the *quorum* was doubted, because of the 57th Act, Parl. 1537, appointing that, to a *quorum*, there shall be at least ten Lords, with the President or Chancellor, (for the four extraordinary Lords make no part of the *quorum*, so that five or six Lords with them could not act:) but custom hath prevailed since, that nine make a *quorum*, as being the major part *in numero im-*

pari of fifteen. If a sentence were pronounced, or advised and voted, by fewer than nine, (as I know several such done in the Lords' afternoon-meetings,) I think they may be quarrelled, and reduced, as pronounced *a non habentibus potestatem;* for, at most, they are but like a committee, and could only but prepare, and report against next day to the full number. But none has yet adventured to quarrel these decreets upon this nullity. *Vide* 10*th June* 1677.

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1679. *June* 4. JAMES EUART *against* JANET CHAPMAN and HARY BROWN.

JAMES Euart, vintner, charges Janet Chapman, and Hary Brown her spouse, upon a bond granted by her before her marriage, for £200 Scots, as the balance of the account of her intromissions as taverner in running his wines. The husband suspends on this reason, That the bond was null, and could not militate against him, because, though it was granted by her before her marriage with him, yet it was after she was contracted, (which interpretatively is reputed to be done *stante matrimonio,)* and after the proclamation of the banns in the church, at which time she could contract no debt to affect him; as the Lords have oft found. And Dury tells it was so decided, 29*th January* 1633, *Scot.*

REPLIED,—The husband must still be liable, because such crying in the church may be clandestine, and cannot put him *in mala fide,* nor a creditor know it. 2*do,* The bond is homologated by partial payment. *N.B.*—If it be made by the wife, without her husband's knowledge, *non relevat* to bind the debt upon him. 3*tio,* It was *in rem mariti versum,* because it is offered to be proven, that, with the said pursuer's money, she bought their household furniture. 4*to,* The husband must here be liable, because it is not a bond for borrowed money, *contra S. C. Velleianum,* but depends on an antecedent cause, as being *institor* or *præposita tabernæ,* and she who has sold his wines and liquors, and received the price thereof. 5*to,* It is offered to be proven they were proclaimed after the granting of this bond.

Thir four last seem relevant; but it may be asked whether the last is receivable against the husband, by way of reply, or if he must be pursued in an action to pay it. And, in both cases, the bond (though proceeding on an account, being *in æstro amoris,*) must be loosed, and they must count over again; in which count, the master stating a charge of her whole intromissions, she must discharge herself, or else the charge will be admitted to probation; in which case, since he permitted her to go out of his service, the practick of the Lords will not sustain it relevant to offer to prove by her oath, that she was intrusted with such a quantity of wines and other liquors, and sold and disposed thereof, (and here, in such a case as this, though she be clothed with a husband, yet her oath must be taken for clearing the debt,) and received the price; but it must also be referred to her oath *simul et semel,* that the same is yet resting owing, and unaccounted for by her: because it is presumed that master and taverner clear accounts, at least once a-week; and that he would not have suffered her to go out of his service, till she had paid him.

But this presumption militates but slenderly in Mr Ewart's case, because he

suffered her to go forth of his service, upon the account she gave him bond for what she was owing him; and, that bond being now quarrelled by her husband, Mr Ewart ought not to be precluded from the same manner of probation he would have got if he had been put to pursue her, and constituted the debt against her, at the time of the granting of the bond.

That the Lords found it only relevant complexly,—that they intromitted,—and that it is yet resting owing, unpaid,—is observed by Dury, 21*st January* 1636, *Couts;* and the same was again decided by the Lords, within these few years, between *Alexander Cromby, Vintner*, and one *Leidington*. As also, in a parallel case, (12th Jan. 1678,) between *Dundass* and *Holborn*, about levy-money, for raising a company. See also 13*th of November* 1677, *Wilson*.

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1679. *July* 10. PATRICK CUNNINGHAM *against* GEORGE SCOT of GIBLESTON.

MR Patrick Cunningham, writer, as having right from his wife, who was assignee, by Francis Hamilton, her former husband, pursues Mr George Scot of Gibleston, steward-depute of Orkney, for the sum of 500 merks, contained in a bond granted by him to the said Francis.

ALLEGED,—1*mo*, The bond is posterior to the assignation by Francis to his wife, and so cannot carry the right of this sum; 2*do*, It is *omnium bonorum*, and so fraudulent; 3*tio*, It was not intimated in the cedent's life; 4*to*, Francis, the cedent, was his debtor for a parcel of whalebone, prior to the assignation, and so he must have compensation.

REPLIED,—He assigns to all debts that shall be due to him at the time of his decease. The 2d is *jus tertii* to the debtor. As to the 3d, it shall be confirmed before extract. The compensation mentioned in the 4th is neither liquidated nor verified, and so is no way receivable, *hoc loco*, against a liquid bond; as the Lords found, Durie, 1*st December* 1626, *Balbegno;* 6th *December* 1626, *Campbel;* and many times since.

This being reported, the Lords repelled Mr George's compensation, founded on the intromission with the whalebone, by Francis Hamilton, cedent, unless he would prove it *scripto*, or by Mr Patrick's oath of knowledge; and ordained the sum to be confirmed; and sustained the *dispositio omnium bonorum tam præsentium quam futurorum*, to extend *etiam ad bona acquirenda*, and as a sufficient active title.

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1679. *July* 10. DAVID SETON *against* JANET LUCKLAW.

IN the action pursued by David Seton, brother to Carriston, against Janet Lucklaw, for payment of a legacy of 1000 merks, left by one to whom Janet was executor;

ALLEGED,—*Absolvitor*, because they had the said David's general discharge.

REPLIED,—1*mo*, That when he subscribed that discharge he had not seen the testament, and so knew not of the legacy; and he offered to prove, by her oath,

that, at the time of his granting that general discharge, the said legacy was neither *actum, tractatum,* nor *cogitatum* among them; and so could not be included.

Newton would not sustain that as relevant and sufficient *per se,*—that the said legacy acclaimed was not then mentioned or communed on; because it might have been paid before that time: and therefore he found, that we behoved farther to refer to her oath likewise, that the said legacy, as it was not then spoken of, so it was neither paid by her, nor allowed at that time, nor at any time before. *Vol. I. Page 50.*

1679. *July* 18. SELKRIG *against* MACFARLANE.

SELKRIG against George Macfarlane's son. There is a bond bearing registration: it is assigned, the assignation is intimated, thereafter the cedent dies; after his death the assignee registrates the writ; the registration is quarrelled as null, the clause of registration being of the nature of a mandate, and *mortuo mandatore expirat mandatum*; and that the cedent's name, who is dead, and not the assignee's, was in the bond, and so it could not be registrate at the dead man's instance.

REPLIED,—The assignation being intimated before the cedent's death, puts the assignee fully in the cedent's place.

This being reported to the Lords, they found, that it might be summarily registrate at the assignee's instance. Some formalists looked upon this as too great a dispensation and relaxation of form; but there is no material iniquity in it. See the Books of Sederunt, 9th July 1661. *Vol. I. Page 51.*

1679. *July* 19. SIR WILLIAM PURVIS *against* MURRAY of LIVISTON, and MR JOHN ELLIS, Advocate, his Curator.

IN a process at Sir William Purvis's instance, as Collector of the Wards, against Murray of Liviston, and Mr John Ellis, advocate, his curator, for payment of £400 Scots, as the taxed avail of his marriage:

ALLEGED,—The words in Liviston's charter, *quando contigerit,* signify when he shall be married, at least when he enters to his lands, at the age of twenty-one years; and so he cannot be liable to pay it sooner.

REPLIED,—These words in law import, that the avail of the marriage is payable as soon as he is marriageable; which is in a man at fourteen, and he is eighteen years old. And after fourteen the superior may offer a woman to his ward-vassal in marriage: *ergo,* the single is then due; *et cessit et venit dies.*

The Lords found it due immediately after fourteen. But this wants not difficulty, and was an interlocutor upon collusion betwixt the parties.

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1679. *July* 23. MURDOCH *against* THOMAS INGLIS.

MURDOCH, an apothecary, pursues Thomas Inglis, merchant, to remove from a shop in Edinburgh.

ALLEGED,—He cannot remove, because Murdoch is but a party owner,—one

Johnston has the other half of the booth; and who consented that he should not flit, providing that he paid his maill, and did not seek another shop.

REPLIED,—Murdoch was only in use to set, and Inglis had taken allenarly from him; and so, unless he had promised, Johnston's promise was not relevant.

The Lords found Inglis bruiked *pro indiviso*; and so, Johnston having consented to his sitting, he could not be removed for this year. See Craig, *Lib.* 2, *Dieg.* 9, *de Migrando.* *Vol. I. Page 51.*

1679. *July* 23. SETON *against* DUNBAR of BLAIRIE.

SETON pursues Dunbar of Blairie for payment of a debt. ALLEGED,—He had accepted a precept for the debt upon Blairie's chamberlain. REPLIED,—*Non relevat;* unless he say that either I got payment by it, or that I accepted it in satisfaction; otherwise law presumes it, like an assignation, to have been only in corroboration. See *November* 1673, *Lauder.*

My Lord Newton inclined to find, that a creditor's accepting a precept from a debtor, upon the debtor's chamberlain or mother, exonered the drawer of the precept, albeit the receiver got not payment, unless he protested it for not acceptance, or, being accepted, if he did not diligence, but suffered the acceptor, on whom it was drawn, to turn bankrupt and insolvent; and found, that in neither of these two cases could the receiver of the precept recur against the drawer; but it was presumed to be taken in satisfaction. Yet thir precepts seem not to be like the case of bills of exchange among merchants, nor to be regulated in that manner, as they are. See 17*th February* 1662, *Wright.* *Vol. I. Page 52.*

1678 *and* 1679. DAVID JACK *against* CLAUD MUIRHEAD.

1678. *February* 14.—DAVID Jack pursues reduction of a comprising led against him, as lawfully charged to enter heir to his father, and of the grounds of it, against Clerk and Muirheads. The first reason of reduction was,—One of the bonds was null, because subscribed by two notaries before three witnesses only. The Lords repelled this, because there were four inserted and designed in the body. *2do,* That, in the decreet *cognitionis causa,* the procurator's name was blank. This the Lords regarded not. *3tio,* That the charge to enter was wrong signetted. This they also rejected. *4to,* That a sheet in the executions, and another in the comprising, were cutted and falsified. Before answer to this, the Lords ordained John Hamilton, writer of the apprising, to be examined. *Vide* 12*th December* 1678, thir same parties.

Advocates' MS. No. 726, *folio* 320.

1678. *December* 12.—DAVID Jack against Claud Muirhead,—*vide* 14th Feb. 1678, [No. 726.] John Hamilton, the writer of the apprising, being examined, and having in some measure confessed the cutting and altering of the two sheets,—the one in the execution and the other in the apprising,—in respect a wrong market-cross was inserted; the Lords first inclined to restrict the comprising to the precise sum for which it was led, cutting off penalties and sheriff-fees, and to make it redeemable, though the legal was expired. But the parties not agree-

ing on that, the Lords, upon ocular inspection, and John Hamilton's declaration, reduced the said comprising *funditus*.

I hear of a case betwixt *Janet Gall* and the *Earl of Wemyss*, in 1675, wherein the Lords, upon naked inspection of the writ, and upon comparing it with other hand-writs of the party, found it false and null; but declared that her bypast using of it should not import any corporal punishment or infamy against her, as producer and user.

Thereafter Jack gave in a bill, craving that Muirhead might account to him for his intromissions. The Lords, in regard it was represented that they were *fructus bona fide consumpti*, on the 8th of February 1679, adhered to their former sentence; and reserved action to Jack against Muirhead, and the other representatives of Muirhead's father, for the intromission with the maills and duties had by them more than will satisfy the debts for which the comprising was led. *Vide infra*, 19*th February* 1679; *item*, 31*st January* 1679, *Irvine*; 1*st February* 1679, *Seton*. *Vol. I. Page* 28.

1679. *February* 19.—In Jack and Muirhead's case, (12th Dec. 1678,) it was debated, if an apparent heir be served, but warn parties to remove before he is infeft as heir, but infefts himself before the term to which he has warned them, if it be sufficient to validate the warning, and if it will accresce. Some distinguished, if it was on a retour it was sufficient; but not, if it was on a precept of *clare constat*, as in this case of Jack. And thus the Lords positively found, that a seasine on a precept of *clare constat*, after a warning, is not enough; as Haddington observes, 4*th March* 1623, *Hermisheills*. Others say, there is no difference upon which of the two it proceed; for a seasine, on a precept of *clare constat*, is a good enough title to remove *quoad* the subject matter and lands contained in the precept of *clare constat*, but *non ultra*; it will not serve for an active title *extra subjectum proprium*. See June 1677, No. 579, § 4; and 24th July 1679; and Stair, *tit. Tacks*, § 36. *Vol. I. Page* 43.

July 24.—David Jack pursues a removing against Claud Muirhead, from some tenements in Hamilton, (19th February 1679.)

Alleged,—The warning is null, because he was not infeft the time of the warning, but after. Replied,—The seasine being upon a precept of *clare constat*, and it being before the warning, it accresces and retrotracted; and so was sufficient.

This being reported, the Lords found the warning null, because the very seasine was not only posterior to the date of the warning, but even to the term of Whitsunday, to which the warning was made to remove.

The Lords had decided the same before, as Haddington observes, who makes a difference betwixt a seasine upon a precept of *clare constat* and a retour. See Dury, 20*th January* 1625, *Elphinston*. If the seasine be prior to Whitsunday, though posterior to the warning, and within the forty days, it will be more dubious if such a warning would be null. See Dury, 18*th July* 1625, *Wallace*. *Vol. I. Page* 52.

1677 *and* 1679. Sarah French *against* the Earl of Weymes.

1677. *July* 25.—Sarah French, as executrix-creditrix, confirmed to ——— Weimes, her husband, pursues the Earl of Weymes for payment of 100 merks in his hands.

ALLEGED,—*Non constat* her husband was dead, and so she has no interest to claim implement of her matrimonial provision till then.

ANSWERED,—It is *jus tertii* to the debtor: he shall be secured at all hands. *2do*, Her husband went to the wars six years ago, and died there; now it is impossible for her to prove he is dead, since she cannot bring witnesses out of France.

This went to the Lords' answer; and they very equitably found, that she, in reason, ought to be burdened with no more but to prove that it was six or seven years since he went out of the country, and that he was *tentus, habitus, et reputatus* dead *in vicinia* where he had lived, and that the bruit and report of the country was of his death; for, in effect, there was no more either possible or prestable to her. Yet the axiom of law runs,—*Quod unusquisque præsumitur vivens nisi probetur mortuus.* See Durie, *25th June* 1622, *Erskin* against *Stevin*; and *Mascardus* and *Vesembec* there cited. See thir parties, 18th January 1679. *Advocates' MS. No.* 617, *folio* 295.

1679. *January* 21.—In the case of Sarah French against the Earl of Wemyss, (25th July 1677,) the Lords, having advised the probation, found the fame of her husband's death sufficiently proven, and therefore decerned the Earl to pay the said sum to her as relict and executrix-creditrix on her contract matrimonial. After which, ALLEGED the debt was not yet proven against him. Wherefore a day is assigned him to depone. *2do*, David Wemyss compears for his interest, and craves to be preferred, as he who was assignee to sundry debts owing by her husband, and had arrested this money, and obtained a decreet against the Earl of Wemyss to make forthcoming. ALLEGED,—Both his assignations and the ground of debt were null, some of them wanting date, others of them wanting writers' names and witnesses. *Vol. I. Page 35.*

July 24.—In the cause pursued by Sarah French against the Earl of Wemeys, (18th Jan. 1679,) Forret having reported to the Lords the competition between her and David Weymes, the Lords preferred her, both in respect of the nullities in his rights, as also because she was a privileged creditor, as relict and executrix, and had a tacit hypothec. *Vide l. un. C. de Rei uxoriæ Actione.*

Vol. I. Page 52.

ANENT IRRITANT CLAUSES, *DE NON ALIENANDO.*

WHERE a charter bears a feu-holding, but with a clause irritant *de non alienando* without the superior's consent, and, in case of alienation, that the feu lands shall return to the superior; this conventional irritancy being committed and incurred by an alienation, it makes the fee open to the superior; and a liferent or other base infeftment granted indeed prior to the said alienation, but not confirmed, will not be able to defend against the superior or his donatar; because, by an alienation, this conventional irritancy makes the fee to return, *tanquam optimum maximum*, as well as the legal irritancy by recognition in ward lands would do. And Newton found this conventional irritancy more pregnant to produce this caducity and casualty to the superior, than the legal one; and this, notwithstanding that it was offered to be proven, that the right was returned again in the person of the apparent heir of the analyier. For, though a disposition made *ab initio*, by a vassal to his apparent heir, does not infer recognition; yet it being once disponed to a stranger, the returning it to the person of the disponer's apparent heir does not purge recognition, nor prejudge the superior.

Vol. I. Page 52.

Anent Recognition.

As the disponing of ward lands, without the superior's consent, infers recognition, and a charter granted *a me* and not confirmed, is null in law; so it may be queried, where the superior subscribes the said charter *a me* with his own vassal, if that will be equivalent to a confirmation, so as to hinder the incurring of the recognition. Some think it will, though, *regulariter*, a seasine taken upon such a charter is null in law; (and the nullity of a seasine does not hinder but, by taking that seasine, recognition is incurred, *quia vassalus contempsit dominum, et fecit quod in se est*; though Craig be of the contrary opinion;) and such a subscription seems not to be *habilis modus* of avoiding recognition, which is only by a resignation in the superior's hands, or by a confirmation: yet any consent of the superior's, adhibited either before or after, stops recognition, if it be before the gift. Of old, the Kings of Scotland used to give their ward vassals a small paper, containing, in few lines, a license to them to dispone upon their lands; which license stopped that odious casualty of recognition.

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Anent Cautioners.

There is a bond granted by one as principal, and others as cautioners, for payment of a principal sum; and when it comes to the obligement for payment of the annualrent, it only binds the principal debtor; which is the style of many bonds, as they use to be drawn and conceived in the West-country. A cautioner being charged upon a bond thus conceived, both for principal and annualrent, he suspends on this reason, that the obligement for annualrent only ties the principal.

Answered,—This conception is but a mere mistake, and it is contrary to the general custom and universal practice received in this kingdom.

Replied,—They offered to prove it was the custom in the west, and it was the general meaning of parties there only to bind the principal for the annualrents, and not the cautioners; because, if the principal do not pay the annualrents duly, then you may call for your principal sum: and this is against no public law, and so is a lawful paction: and consuetudes are local, and derogate from the municipal customs; *et, in dubio, mos illius regionis ubi res agitur*, is attended. *L. 34 D. de R. J.*

This was debated, but not decided. Some of the Lords inclined to sustain the custom, if it were proven. *Vol. I. Page 52.*

Anent Bonds of Corroboration.

Where a bond of corroboration is charged on, and the principal bond which is corroborated is not yet extant, or not produced, *quær.* if the bond of corroboration be valid by itself alone, without the principal. *Videtur quod non;* for *non creditur referenti nisi constet de relato; et, sublato principali, tollitur accessorium.* Yet I would think the corroboration binds him to pay the debt, though the first bond, in corroboration whereof it was granted, were perished; and it burdens the debtor to prove that the first bond is extinct, cancelled, and retired, by payment. *Vol. I. Page 53.*

ANENT TESTAMENTS.

It was queried if a testament, whereof the dead's part in the inventary exceeds £100 Scots, (for, if it be within that, there is little doubt,) be only subscribed by one notary, if it be null by Act 1579, requiring two notaries and four witnesses to all writs of importance, which is interpreted to be writs above £100 Scots. Some thought it valid, because *ultimæ voluntatis liber debet esse stylus, et liberum quod non iterum redit arbitrium. L.* 1 *C. de S. Sanct. Eccles.* 2do, By Act 1584, one minister is declared enough; *ergo* also one notary. Others thought it null; and that the argument from a minister to a notary was not good, the law reposing more confidence in a minister's faithfulness than in a notary's.

The Lords indeed have found contracts of marriage, subscribed only by one votary, valid, if marriage hath followed thereupon; Durie, *ult. February* 1637, *Lockhart*; *ult. January* 1639, *Dundas.*

The Lords found a testament privileged; and that it needed not two notaries and four witnesses; Hadd. 18*th January* 1623, *Boog* against *Hepburn.* See Stair, *tit.* 30, and *infra*, 23*d June* 1680, *Ogilvie.* *Vol. I. Page* 53.

1679. *July* 28.

A WRIT, consisting of more sheets than one, was quarrelled as null, because not side-subscribed. The party user offered to get it side-subscribed; upon which the Lords allowed him to do it. *Vol. I. Page* 54.

1679. *July* 29. JAMES MILLAR *against* CRAMOND.

IN James Millar's suspension of a decreet, obtained against him, by one Cramond, a surgeon in Kelso, for curing him of a *hernia*:

The Lords, having considered the probation of the employment, and furnishing the drugs, and finding that it was very slender, and did not condescend upon particulars and the quantity furnished, and that some of the witnesses were women; yet, in respect there was somewhat proven, they took the pursuer's oath in supplement of the probation. *Vide* 31 *D. de Jurejurando.*

Vol. I. Page 54.

1679. *July* 30. JOHN EWART of MULLOCK *against* SIMEON COOPER, Minister of Kirkcudbright.

IN a bill of suspension, presented by John Ewart of Mullock, against Mr Simeon Cooper, minister of Kirkcudbright, for his stipend, upon this reason,

That his teind was by law exemed and privileged, and not liable in payment of ministers' stipends, or any other burdens, because he held his lands of the abbacy of Holyrood-house, *cum decimis garbalibus inclusis*; *et decimæ inclusæ* were free by law:

ANSWERED, for the minister,—That *decimæ garbales inclusæ* were only the *decimæ minores*, the vicarage; and the minister charged for the parsonage.

REPLIED,—It was a great error to interpret *garbales* the vicarage; and which was sufficiently confuted from Craig's authority; and Skeen, *de Verb. Signif. voce Garba Sagittarum*, tells it signifies a sheaf; and in the same sense it is taken by Guillim and other heralds, in their books of heraldry, where they speak of the bearing of *gerbes*; and *herba*, in Latin, comprehends corns as well as herbs; and so in the Italian language: and, in our style, parsonage teinds are more frequently expressed by *garbales*, than either by *decimæ rectoriæ* or *decimæ prædiales majores*.

This being reported to the Lords, they found *garbales* signified parsonage teinds.

Thereafter it was ANSWERED, for the minister,—That Ewart had been in use of payment forth of these teinds; *ergo*, they were not exemed; and *triennalis possessor non tenetur docere de titulo in beneficialibus*.

REPLIED,—Any such voluntary erroneous payment could not bind him to payment *pro futuro*, especially where we condescend upon his title that it is *invalidus et vitiosus*. The last point was taken to interlocutor.

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1679. *July* 30. SIBBALD *against* RALSTON.

IN the case of Sibbald and Ralston, the reason of suspension was, That the bond was discharged. To this it was ANSWERED,—1*mo*, The discharge related to another sum; and the general clause on the margin, of all other debts or bonds, was most suspicious, and adjected since, with another hand and other ink. 2*do*, The debtor, by a letter posterior to that discharge, had acknowledged the debt, and craved a time to pay it.

REPLIED,—The discharge was opponed, and the letter was holograph, and not clear that it meant this debt.

This being reported, the Lords, in respect the marginal note was vitiated, and the letter was posterior to the discharge, found the letters orderly proceeded, notwithstanding of the discharge. *Vol. I. Page 55.*

1679. *July* 30. BOOG *against* JOHN MUIR, Stabler.

IN the competition between Boog, and John Muir a stabler, in a removing; Newton refused to sustain seven years' possession, as sufficient to prefer in a removing against an infeftment which was prior in date; but he confessed that seven years' possession was sufficient in an action for maills and duties, (which is a possessory judgment,) against an infeftment prior in date; only found the

naked priority of the right sufficient to give preference *in judicio de migrando*. See Hope's Minor Pract. *tit.* Of Removings; and 9*th June* 1677, *Guthries*.

This is doubted, as *non bene judicatum*. *Vide infra*, at the end of *February* 1680, *No.* 42, *p.* 97. *Vol. I. Page* 55.

1679. WILLIAM SYME and ELIZABETH KINLOCH *against* WILLIAM BAILLIE.

January 9.—MR William Syme, and Elizabeth Kinloch his mother, against William Baillie, brother to umquhile Mr John Baillie, advocate, on the passive titles, for paying a sum whereto she had acquired right by assignation from a creditor of the said Mr John, her [last] husband.

ALLEGED,—She had accepted from Mr John a disposition of all his goods, with the burden of his debts; and so, *ipso momento* that the debt came in her person by the assignation, it, *ipso jure*, became extinct: the same person being both debtor and creditor, *confusione tollebatur obligatio*. *Et quem de evictione tenet actio, eundem agentem repellit exceptio*; *et frustra petit quod mox esset restitutura*. And it could not reconvalesce by her transferring the right of it to her son, because it was extinct. See Stair, *tit.* 11, § 9, Of the Confusion of Obligations; and *tit.* 31, § 17; *et supra*, 6*th December* 1678, *Cleland*.

2*do*, ALLEGED,—William was not vitious intromitter with the eighth part of the ship libelled, because he had right to it by a disposition, which purges vitious intromission.—But, in this case, they must make the subject intromitted with forthcoming to the creditors. *Vide* thir parties, 31*st July* 1679. *Vol. I. Page* 32.

July 31.—In the action, —— Syme against William Baillie, (9th Jan. 1679,) the relict having deponed that her disposition from her husband gave her right and title to call in for all his debts, and consequently for this:

At the advising, I ALLEGED,—That her disposition was *donatio inter virum et uxorem*, and so revocable, and revoked *tacite* by the posterior disposition to his brother.

REPLIED,—It was not a *pura donatio*; because she had paid debt equivalent to the benefit she made by the disposition.

The Lords ordained her to count and reckon, that it might appear whether or not she was *lucrata* by the said disposition. *Vol. I. Page* 55.

ANENT TITLE to PURSUE.

IT was doubted, where one pursues an improbation of his father's bond as false, whether he must be served heir before he can have a title to pursue. *Vol. I. Page* 55.

ANENT CHARGES to enter to SUPERIORITY.

A SUPERIOR is not infeft, and the vassal is unentered, and desires to enter. *Quær.* what he shall do. Whether shall he only charge his superior to receive him, (which he cannot validly do, nor give him a charter, he not being yet his superior;) or if he be obliged to charge him upon forty days to enter to the su-

periority, conform to the 57th Act Parliament 1474, and then to infeft him; and upon his refusal then to apply to the next superior. This is undoubtedly the securest way; and being used, will, in a competition, be reputed equipollent to a past infeftment. *Vol. I. Page 55.*

Anent the Sale of Lands.

Where a man buys land at the Whitsunday, and makes it a Whitsunday's bargain, by paying the price at the term; the buyer, in that case, by the received custom, gets the haill crop that is then upon the ground, or the whole money rent paid forth of the land bought; albeit the seller gets only half a-year's annualrent of the price, from the Whitsunday at which the bargain is made to the Martinmas thereafter: because, though the crop be due betwixt Yule and Candlemas by the tenants, yet commonly masters, when they sell it, make not money of it till the next Whitsunday, and so it comes in to him then instead of the annualrent of the price which he gave out. But if it be a Martinmas bargain, then the buyer gets the half of the crop that is newly separated from the ground, by the same rule, and enters to the labouring for the ensuing year; else he should lose half a-year's annualrent of his money, and get nothing in place thereof. Even as a liferenter dying after Whitsunday gets the half, and, dying after twelve o'clock on Martinmas-day, he gets the whole. *Vide* at the end of February 1680. *Vol. I. Page 55.*

Anent Cautioners.

Where one or more cautioners, with his own means, and not out of the means of the principal debtor, pays a debt, the Lords have lately ordained the creditor to assign the cautioner payer, not only against the principal debtor, but also against the co-cautioners, who are bound to relieve one another *pro rata*. Yet the contrary had been decided, that a creditor was not bound to assign to a cautioner, but only to discharge him. *Vol. I. Page 55.*

Anent a Liferenter's Right to Teinds.

Where a woman is liferenter of lands only, without express mentioning of the teinds, and these teinds are valued; some think, by the Act of Parliament 1633 and the posterior acts for valuing teinds, the liferenter may claim these teinds, (without any assignation or right to the decreet of valuation,) upon her offering to pay the valued duty; it being allowed to a liferentrix to value the teinds of the liferented lands as well as to the fiars. But if the teinds had been bought before the constitution of her liferent-right, may she draw *ipsa corpora* of the teinds, upon her offering to pay yearly the annualrent of the price that was given for the sale of the teinds? Some think she will not have right to the decreet of sale, on that offer. *Vol. I. Page 56.*

Anent Violent Profits.

In a decreet of spuilyie of sheep, the violent profits are decerned to be paid

from the day that the spuilyie is proven to have been committed. It was inquired whether the violent profits of the goods for that very day whereon the spuilyie was perpetrated will be included in that decerniture, and may be sought. It is thought not; because violent profits are penal and odious, and so the time is not counted to run *de momento in momentum*, and commences from that day *exclusive*. Some may argue the interpretation should be strictly taken against the spulyier, *in odium spoliantis*. *Vol. I. Page 56.*

Anent Donatars.

By law the donatar is obliged to pay the debt contained in the horning whereupon his gift proceeds: as also, by Act 1621, sums not bearing annualrent do bear it after denunciation of the horning; so that the rebel debtor denounced is from that time liable in annualrent. But the question is, whether or not the donatar is in the same case with the debtor, or in a better case, and if he will be liable for the annualrent due after the horning, and existing upon the denunciation, as well as for the annualrents due before the horning, as the common debtor is. *2dǫ*, Since the donatar is bound to purge the debt of the horning, what if he alleged that, by intromission upon his gift, he hath not recovered so much as would satisfy the debt of the horning? I think, as to the debt of the horning, the donatar is like to an executor bound to do diligence, and to assign.
Vol. I. Page 56.

1679. *November* 8. Francis Farquharson of Finzean *against* the Earl of Aboyne.

Francis Farquharson of Finzean pursues a declarator against the Earl of Aboyne, to hear and see the Earl discharged to molest the pursuer's fair, and to intercept the cattle coming thereto, upon the pretence that he hath a fair on the other side of the river of Dee that same very week; seeing the pursuer's fair is the oldest, and Aboyne's is only impetrated since *in æmulationem vicini*. See the like case in Dury, *June* 1642, *Glenfarquhar*. *Vol. I. Page 62.*

1679. *November* 8. Doctor Trotter *against* James Kinnier.

In the suspension, Doctor Trotter against James Kinnier in London, the Lords having advised James Kinnier the charger's oath, they found it did not prove his reason of suspension, that the charger had received goods which were sent to the said doctor. Therefore they found the letters orderly proceeded. But, on a bill, assoilyied the doctor from the penalty, but refused to cause reëxamine the charger. *Vol. I. Page 62.*

1679. *November* 12. PATRICK COCKBURN *against* JANE BLACKBURN and JAMES WOOD her Husband.

PATRICK Cockburn of Borthwick against Jane Blackburn and James Wood her spouse. The Lords simply annulled a decreet in absence, pronounced on the 31st day of July, because it was not a sentence done in the Inner-House, and the 31st of July is not a sitting day in the Outer-House. But if it had been pronounced before, and scored out for not paying the half-crown for the macer's dues, and then put up in the minute-book as dated the last day of the Session, this would suffer more debate.

In this case Newton likewise found, that Patrick Cockburn's retour, as heir to his father, was not a title in this declarator of the expiration of a back-tack in a wadset, but he behoved also to be infeft in the wadset lands, and to produce it; but found, though this objection was competent to the heirs of the granters of the wadset, yet it was *jus tertii* to the relict, though she had a liferent infeftment, because it was posterior to the wadset. *Vol. I. Page* 63.

1679. *November* 13. ANENT EXECUTORS-CREDITORS.

THE Lords made an Act of Sederunt, determining what diligence executors-creditors should be obliged to do for discussing the inventory of the testament. *Vol. I. Page* 63.

1679. *November* 13. WILLIAM SOMERVILLE *against* His CREDITORS.

MR William Somerville seeking to come out of prison on a *cessio bonorum*, and a disposition offered by him to his creditors, he having, before his incarceration, disponed all his lands and other estate to his son, (which may be reduced on the Act 1621, but cannot be summarily annulled,) and the Creditors offering to aliment him in prison; the Lords refused to liberate him; but in the mean time ordained him to depone on the truth of the disposition offered by him, and modified two groats to him *per diem*; and in case weekly, at each Saturday, it were not paid him, then they appointed him to be set at liberty, he wearing the habit. *Vol. I. Page* 63.

1679. *November* 14. The FEUARS of DIRLETON *against* SIR JOHN NISBET of DIRLETON.

IN a declarator of a servitude of pasturage, quarrie, lime-stone, birlaw-courts, &c. raised by the Feuars of Dirleton against Sir John Nisbet; Newton would not sustain a naked seasine as a sufficient active title in the said declarator, till the charters, precepts of *clare constat*, and the other warrants of the seasines, were produced. *Vol. I. Page* 64.

Anent Executions of Inhibitions.

Newton annulled an inhibition, because it wanted the three several oyeses at the market-cross, though it was positively offered to be proven that they were truly made; because the expressing them in the execution is *de forma ejus essentiali*, and cannot be supplied. *Vol. I. Page* 64.

1679. *November* 15. Bust *against* ———.

In a case betwixt one Bust and ———, an assignee charges for a sum. The debtor suspends upon this reason, That he offered to prove, by the charger's oath, the assignation is to the cedent's behoof; which being confessed, then he proponed payment or compensation against the cedent. The assignee appears, and depones that it is to his own behoof, but that he had got an assignation to a debt on thir terms: that, if he could recover payment, then to pay himself therewith; if not, then the cedent was still to be his paymaster, and not to be exonered of the debt.

The Lords, at the advising of this oath, had some inclination to find this assignation was upon the matter to be reputed to the cedent's behoof, seeing it was not taken by him in satisfaction, but only as a collateral security, and in corroboration; but it was not fully decided. *Vol. I. Page* 64.

1679. *November* 15. George Young of Winchburgh *against* William Nicol, Trumpeter.

George Young of Winchburgh charges William Nicol, trumpeter, to count to him for the assignation he had given him to Kennoway's back-bond, and to the gift of Hugh Sinclair's liferent-escheat. Nicol's reason of suspension, with respect to the gift of the liferent-escheat, was, that he had done all legal and necessary diligence against the tenants, by imprisoning them; and they came out upon a suspension and multiplepoinding, wherein, at the discussing, many creditors of Hugh Sinclair's, who had real rights on the lands, were preferred to him, and he secluded and debarred by them, they having been clad with possession prior to Hugh Sinclair's denunciation to the horn.

Answered,—Ought to be repelled; because it is offered to be proven, that the rent of the lands falling under the escheat are worth L.200 sterling *per annum*; and that the annualrents of the preferable infeftments were within 2,400 merks yearly, so that there was an annual excrescence of 1,200 merks yearly, which Nicol might have uncontrovertedly affected; and so, not doing it, he was *in mora*.

Newton very justly appointed both parties to count and reckon, and George Young to prove the rental of the escheat lands, and William Nicol to prove what preferable rights debarred and secluded him from the possession, that, *ex eventu* of both probations, it may appear if there was any excrescence.

Then Nicol ALLEGED,—He could do no diligence on the back-bond, because Kennoway died shortly after, and the papers were not delivered to him; and, when he spoke to Kennoway's relict to denude, she craved payment of the expense her husband was at for leading the said apprising, conform to an express quality and condition in the back-bond.

ANSWERED,—Oppones Nicol's obligement to do all legal and necessary diligence upon the back-bond, so that he should have pursued Kennoway's representatives thereon.

This being reported on the 21st of November thereafter, the Lords found, that Nicol, having accepted an assignation to the back-bond, he, by the quality of his assignation, was bound to have done diligence thereon.

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1679. *November* 19. ALEXANDER ARBUTHNOT, Minister at Arbuthnot, *against* SIR ALEXANDER FALCONER of GLENFARQUHAR.

IN the charge, Mr Alexander Arbuthnot, minister at Arbuthnot, against Sir Alexander Falconer of Glenfarquhar, as donatar to the ward of Sybbald of Kair, (*vide* 26th Feb. 1678, *supra*, page 288,) for payment of the stipend due to him forth of these lands:

The Lords having this day advised the minister's oath, they found he had, by his oath, acknowledged he had intromitted with 54 bolls of victual of the rents of the lands of Kair, contained in the bond produced, granted by Robert Arbuthnot, tenant in Kair, to him; whereof two chalders of victual, two parts meal, and third part bear, of the crops 1675 and 1676, being the years charged for. And find the oath proves the cause of the granting that bond by the said Robert Arbuthnot the tenant, was, because the said minister had granted a tack of the teind of these lands to Harie Guthrie, then possessing *qua* donatar; and the said Hary had given the said tenant a discharge of his farm: and therefore find Glenfarquhar's reason of compensation against the minister is proven by the minister's oath; unless the charger will condescend and instruct that Hary Guthrie had a right to the lands, by virtue whereof he might grant a discharge to the tenant, and exclude Sir Alexander Falconer's right; or that Sir Alexander had uplifted these years' rents himself; reserving to the minister charger, in case Sir Alexander or Hary Guthrie shall pursue upon the tack, to allege it can have no effect till the said composition of 54 bolls be repaid him; and ordain Sir Alexander's discharges produced to be allowed *pro tanto*. And, in regard the minister is not clear in his oath as to the prices of the victual, find him liable for the prices thereof, conform to the sheriff's fiars of those years.

Then, by a bill, the minister, among other things, offered to prove, that Hary Guthrie acted as pro-tutor, and was holden and reputed in the country as donatar to the ward. The Lords refused this petition. *Vol. I. Page* 64.

1679. *November* 19. DAVID LINDSAY *against* THOMAS CRIGHTON.

IN the action, David Lindsay, bailie of Edinburgh, against Thomas Crighton; the Lords found Thomas's engagement to pay £54 for his brother Patrick, to save his shop from being poinded when he was lying on death-bed, was not a bargain, (as was alleged,) but truly of the nature of a promise; and so was probable *scripto et juramento*, and not by witnesses, as was desired. See *3d July* 1668, *Donaldson*; *19th January* 1672, *Deuchar*; *December* 1672, *Young*.

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1679. *November* 19. ANENT the REGISTRATION of HORNINGS.

AN Act of Sederunt made, that hornings be only registrate in the shire's register where the party denounced dwells, or in the general register at Edinburgh; and that the registration bear the particular book and leaf, as seasines do. Being thus immediately booked, parties will not get them out sundry months after the denunciation, as they would have gotten them formerly.

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1678 *and* 1679. MENZIES of PITFODDELS *against* THOMSON of ARDUTHIE.

1678. *November* 14.—MENZIES of Pitfoddels, and Mr James Thomson of Arduthie, pursue mutual declarators of their rights of property, commonty, pasturage, and molestation upon the muir of Muirsky: wherein Pitfoddels craved to be preferred in the probation, because more pregnant in his condescendence; and he had a bounding evident, (very old,) extracted out of the Bishop of Aberdeen's register, which Mr James had not; and that Hay of Urie, Mr James's author, had homologated and acknowledged it, by taking a transumpt thereof.

Notwithstanding of all which qualifications, the cause being reported to the Lords, they granted a conjunct probation to both parties for proving their libels; which some thought singular. *Vide infra, 24th February* 1679.

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1679. *February* 25.—In Arduthie's case with Pitfoddels, (14th Nov. 1678,) the Lords refused a reëxamination of the witnesses; but ordained Glenfarquhar, who was the judge in the commission, and in town, to be examined on the sins of omission and commission represented in Arduthie's bill, and whereon he craved a reëxamination of the witnesses, there being much trinqueting alleged therein.

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1679. *July* 29.—This day was debated the report of the commission, in the cause between Pitfoddels and Mr James Thomson of Arduthie, (14th Nov. 1678;) and the Lords, in respect the testimonies of several witnesses were neither subscribed by the judge nor witness, and upon the account of sundry

other informalities, as adding, interlining, &c. they granted a reëxamination, and a new commission to Newton and Pitmedden. *Vol. I. Page 54.*

1679. *November* 21.—In the action, Mr James Thomson of Arduthie against the Laird and Lady Pitfoddels, (14th Nov. 1678,) the Lords having considered the probation adduced by both parties, they find and declare that the march betwixt the barony of Maryculter and the barony of Ury, is to begin at the west part of the muir, nearest to the south-east nook of the black folds of Brachmont, where it is found proven that the cross of Brachmont stood, and that the same proceeds in a right line eastward to that part of the muir on the east hand that is nearest to the side of Corsley. And ordain the Lords Newton and Pitmedden, who formerly visited the bounds, to set marches in the said muir of Muirskie accordingly. And declare, that that part of the muir on the north side belongs in property to Menzies of Pitfoddels, and that Mr James Thomson has no right of commonty or servitude thereupon; and that that part of the muir that lies on the south side of the line, belongs in promiscuous pasturage to Pitfoddels and Mr James, according to their several interests.

For clearing the Lords at advising, Mr James produced a scheme or diagram of the muir, and the whole marches controverted. *Vol. I. Page 65.*

1679. *November* 21. Elizabeth Duff *against* Her Debtors.

In the action pursued by Elizabeth Duff, daughter to umquhile Thomas Duff, tailor, against her debtors; though many of the sums pursued for were very inconsiderable, and far within 200 merks, as to each particular person's debt, which, by the Act 1672, are appointed to be pursued *in prima instantia* before inferior courts, yet the process was sustained before the Lords, because the debtors dwelt in several shires, conform to the exception in the said Act.

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1679. Sir David Balfour, Lord Forret, *against* Heriot of Ramorney and John Craig her Husband.

January 16.—In the reduction and declarator pursued by Sir David Balfour, Lord Forret, against Mr John Craig of Ramorney and his Lady, (being reported by Newton:)

The Lords, notwithstanding of the decreet produced, do ordain a new visitation to be had, and witnesses to be examined *hinc inde*, both as to the moor and monksmoss, and milns of Pitlessie and Ramorney, the witnesses not exceeding fifteen in either cause, for either party. And they have no regard to the witnesses already adduced, nor to the decreets following thereupon; in respect the commonwealth's interest is reserved therein; the Earl of Crawford, heritor, was then prisoner in the Tower of London, and the wadsetter was not called; and, in respect that the particular depositions are not subscribed, either by judge or witnesses, but only in the end by the judge and clerk; and the several leaves of the depositions are not marked. *Vide infra, 26th November* 1679.

Yet it is affirmed there was a decision in the case of one Caldwel, sustaining depositions, though not subscribed by the parties. It may be they could not write, or this nullity was not objected. Some say, in the time of the English usurpation, it was not necessary that witnesses should subscribe their depositions; but this I hardly trust. In this cause it was debated, that this decreet, being *in foro*, upon a plenary probation, was now irreducible, not being reviewed within a year; conform to the 12th Act, Parl. 1661. But the Lords went over that, which seems only to allow a summary procedure, and dispense with some formalities of law, in quarrelling decreets in the English time; but does not hinder to draw them in question afterwards, *via ordinaria*, by reduction. *De revisione impetranda intra biennium*, see *Bourit. de Offic. Advoc. c.* 34.

Though the Lords have not regarded the probation already made, yet we may consider what use may be made of it, from Andr. Gayl. *lib.* 10, *obs.* 103. *Vide etiam quæ eleganter habet Imbert. in forens. institut. lib.* 1, *c.* 43.

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November 26.—In Sir David Balfour, Lord Forret's cause, against Heriot of Ramorney, and Mr John Craig her husband, (16th Jan. 1679;) the Lords having advised it, they found, by the writs and testimonies of the witnesses adduced by either party, that the heritors and possessors of the lands of Pitlessie, now belonging to the Lord Forret, have common pasturage over all Edin's-muir benorth the cart-gate of Pitlessie, and also over all the Munk-moss; and that they also have the privilege of casting peats, feal, and divots, through the said muir and moss, except two acres in the south-east nook of the said moss. And that there are no interruptions proven on Ramorney's part, preceding the decreets now turned into a libel, which are only in 1656. And find, that a part of the said common muir has been appropriated and riven out in the east side of the hollow at the back of Richard Pryde's house; and ordain Ramorney to lay the same in again, to be common to both parties. And find, that the mill-dam and mill-land of Pitlessie have been, past memory, as it now is; and that it is not the occasion of the regorging the water upon the mill of Ramorney; and that the stone called the witterstone is not a stone for regulating thereof: and therefore ordain the said mill and mill-dam to stand as now they are, and the march-stones in the muir and moss to be taken up and removed away. And assoilyie from the two decreets now turned into a libel. *Vol. I. Page* 66.

1679. *November* 27. ROGER MOUAT, Skipper, *against* SOMERVILLE.

ROGER Mouat, skipper, pursues Mr William Somerville for payment of sundry debts contained in his father's bonds. ALLEGED,—They were granted on death-bed; and he, as heir, had a reduction thereof depending *ex eo capite*. ANSWERED,—They offered to prove an antecedent onerous cause, prior to his contracting the said mortal sickness; and it is very well known that bonds granted to tradesmen, though upon death-bed, yet if the furnishing be proven, are sustained. Yea, in the general, a prior onerous cause proven will sustain bonds against that nullity of death-bed; as was found, *27th July* 1678, *Heriot*.

This being reported, the Lords, on 28th of November, before answer, or-

dained Roger Mouat to produce Thomson's old retired bond and discharge, which Mouat paid for John Somerville, and for which it is alleged that Somerville gave this new bond to Mouat on his death-bed, which is now quarrelled: and to produce all other adminicles and documents by which it can be made appear that this new bond was granted by John for that old one, and so that it had an antecedent onerous cause. *Vol. I. Page* 66.

1679. JOHN STRAITON *against* GILBERT BELL.

July 25.—IT was queried,—There is an effectual comprising by taking infeftment thereon: there is another comprising led within the year, conform to the 62d Act 1661, but no infeftment taken thereon, which by law comes in *pari passu* with the first: thereafter there is a third comprising led, whereon infeftment is taken. The first apprising is extinct and satisfied by payment; the second appriser thereupon finds it necessary to infeft himself; and so takes seasine. The competition of preference fell in between the second and third appriser. The third contends, that, though he was the last appriser, yet he was the first infeft. The second alleges, he was *in bona fide* not to take infeftment as long as the first continued in being, unextinguished, since he was, *fictione juris*, a part thereof, and his posterior infeftment must be drawn back to the date of his apprising.

REPLIED,—It cannot retrotract, because the third appriser who is infeft is a *medius obex* and *impedimentum* betwixt the second.

This is a very debateable point. See it decided *infra*, *6th November* 1679, *Straiton*. *Vol. I. Page* 53.

November 6.—In the action (mentioned 25th July last,) betwixt John Straiton and Gilbert Bell, anent the three apprisers;—the Lords found the second appriser, though last infeft, yet he was preferable in the competition to the third appriser, infeft before him; because, being within year and day of the first apprising, he was, by Act of Parliament, once a part thereof; and, during the time of its existence, he needed not take infeftment. *Quid juris*, if the second appriser had not been infeft at all? See thir parties, at 28th current. *Vol. I. Page* 61.

November 28.—In the action, Straiton and Bell, (mentioned 6th Nov. curt.) it was questioned, whether a decreet of adjudication of lands lying in the Canongate may be legally obtained before the bailies of Edinburgh.

It was ALLEGED, not to be *forum competens ratione re sitæ et domicilii*, the Canongate not lying within the royalty of the burgh. See *2d December* 1675, *Nasmith*.

It is but a late practice that adjudications were pursued before the sheriffs and other inferior judges; for Hope tells us, they were, in his time, only competent before the Lords. Yet this day the Lords found a decreet of lands, lying in the Canongate, pronounced, by the bailies of Edinburgh, valid, as given *a judice competente*, in respect of the custom these thirty years past, and that they have been in use to give such decreets. *Vol. I. Page* 66.

1679. *November* 29. Robertson *against* Home of Eccles.

In a case, Robertson against Home of Eccles, Harcus found an apparent heir's voluntary paying annualrent for a sum owing by his father's bond, (to whom he was not otherwise heir,) was not such a passive title as to be a homologation by entering in use of payment, or to lay an obligation upon him to pay the rest of it, (which would have bound him to annualrent, if it had been his own bond not bearing a clause of annualrent, or if it had been granted by him in his minority, and he had paid annualrent for it after his majority, for that would have tied him;) for his civility ought not to make him liable to pay the rest of the debt; much less then can it be an argument for other creditors to crave payment thereon; for an apparent heir may voluntarily pay one, and not another. See Dury, *26th January* 1628, *Commissary of Dunkeld*; and *penult. July* 1630, *Johnston*. *Vol. I. Page* 66.

1679. *December* 6. John Beaton, Minister at Ayton, *against* ———.

Mr John Beaton, minister at Ayton, pursues a spuilyie of his horse feeding upon grass designed to him by the bishop, upon a visitation, for pasturage of two kine and a horse, conform to Act of Parliament.

Alleged,—The designation was null, and the heritors not called. Answered,—It stands unreduced. Farther alleged,—It was the heritor's own grass, till the minister had obtained a decreet for that grass upon his designation; and so he might poind the minister's horse.

The Lords found it a spuilyie, and decerned largely for the price of the horse. *Vol. I. Page* 67.

Anent Conjunct Persons.

It was debated before the Lords, whether a cousin-german, or a cousin-german once removed, receiving a disposition from a bankrupt, is to be reputed such a conjunct person as is meant by the Act 1621; for they may marry together, and the relation, as to the design of the Act of Parliament, must stop somewhere.

It is affirmed the Lords found a cousin-german such a conjunct person. See Mackeinzie's Observes on that Act. *Vol. I. Page* 67.

1679. *December* 10. The Earl of Winton *against* The Procurator-Fiscal of Linlithgow.

In the suspension by the Earl of Winton of the Procurator-Fiscal of Linlithgow his charge; it went to interlocutor, if a blanch vassal of his Majesty's, having his lands *pro omni alio onere, &c.* without a special citation or warning, requiring him to be there present, be obliged to answer at the sheriff head-

courts. I think he is not. See this agitated at great length in my Observes upon the Act of Parliament made in 1672. *Vol. I. Page* 68.

1679. *December* 11. THOMAS WILSON *against* WILLIAM BROWN.

THE debate betwixt Thomas Wilson and William Brown being reported, the Lords reponed William Brown, against the decreet, to his oath, or allowed Thomas Wilson to prove his account by witnesses; and decerned Brown to pay to Wilson £20 Scots, as the expense of his decreet, which is now turned into a libel. *Vol. I. Page* 68.

1679. *December* 16. ANENT BLANK WRITS.

ONE charges upon a bond: compearance is made for a third party, and he ALLEGES the bond was granted originally blank in the creditor's name, and was so delivered to one who was his debtor; and he had arrested the money before this charger's name was inserted in it; and he offered to prove this by the writer and witnesses.

ALLEGED,—The bond being in the charger's name, it could not be taken away but only by his oath, or a writ under his hand. Yet the Lords, before answer, ordained the principal bond to be taken out of the register, that, after inspection, they might consider whether or not the creditor's name had been blank in it *ab initio*, and was filled up since with a different hand and ink; or if it was all one context. And ordained the creditor charger to give his oath of calumny when his name was filled up therein, or the same delivered to him. And thereafter ordained the writer and witnesses to be examined, to expiscate if there was any fraud. But this was judged by some a hard and dangerous interlocutor. *Vol. I. Page* 69.

1679. *December* 18. *ANENT PACTUM PORXENETICUM.*

IT was debated whether *pactum proxeneticum* was lawful, seeing it was done *in æstro amoris*, which is a kind of fury, and *gesta in furore non tenent;* but *æstrum amoris* is not so known in law as to be a ground whereon to quarrel what is then done, else all matrimonial provisions might be quarrelled. See *Benevent. Stracca de Proxenetis*; and Harprecht. *ad* § 1, *Inst. de Inoff. Test.* But I think there will be little doubt that a curator ought to seek no reward for procuring a good marriage to his minor. *Vol. I. Page* 71.

1679. *December* 19. The COUNTESS of CASSILS *against* The EARL of ROXBURGH.

IN an action betwixt the Countess of Cassils and the Earl of Roxburgh, an arrestment was quarrelled as null, because it was not personally done, and yet bore not six several knocks to be given at the most patent door.

Some ALLEGED these knocks were required in citations, but not in arrestments. It was ANSWERED,—They offered to prove a copy was left with his wife. Which (though the execution bore not,) the Lords sustained it as sufficient to maintain the arrestment, though it wanted the six knocks; since a citation given to one's wife is almost personal, and will very readily come to his knowledge. *Vol. I. Page* 71.

1679. *December* 19. ANENT the DESIGNATION of GLEBES.

I HEAR that the Lords found, that the relief which is due to an heritor, of whom the designation of a minister's glebe is taken, was only a personal obligement on the present heritors of that parish and their heirs, but would not affect and reach their singular successors in these lands. So that it is their interest immediately to pursue their action of relief, seeing this relief is not *debitum fundi*; for nothing is to be interpreted *debitum fundi* but what either an express law or uncontroverted practice hath made such. And it were against the freedom of commerce to make too many *debita fundi* for reaching singular successors, who can be certiorated thereof by searching no register for designation of glebes or the like. *Vol. I. Page* 71.

1679. *December* 19.

IT was queried if a decreet of transferring must be extracted before you be obliged to debate in the process transferred; or if the minute and signature, bearing that there is a decreet pronounced, be sufficient, and will be warrant enough for proceeding in the principal cause. *In rigore juris* it should have been extracted: however, it was *casus judicis arbitrarius*, until the Lords of Session about this time, by their Act, ordained all decreets of transferring to be extracted, before they can proceed in the old cause; for the President's son, Mr James, is now a clerk, to whose advantage it is calculated.
Vol. I. Page 72.

1680. *January* 2. ANENT SUMMONSES and PROCESSES.

I.—IT was ALLEGED against a summons,—No process; because the second citation is given before the day of compearance in the first citation is elapsed: and thereupon he takes instruments: the pursuer takes up his second execution and mends the date of it, and offers to abide by it.

REPLIED,—That he might have amended it before calling, but he cannot be suffered to do it now after that it is quarrelled; but he ought to cite of new again for the second diet.

II.—A process is returned by an advocate, and two or three are marked *a partibus;* but all the time it is never seen by any advocate, and then it is of new enrolled. At the calling it is ALLEGED,—That it must be seen *in communi forma* before they can be obliged to debate, they not having seen it now these several years; and, if year and day expire, there are Acts of Sederunt appointing it should be given out again to be seen by the contrary party's advocate; and it is relevant to offer to prove, by the clerk's oath, that the *partibus* was not yearly marked, but only lately. See Act of *Regulat.*

III.—In summons against sundry defenders, the Lords have discharged to insert two sundry days of compearance, though never so many were called; and ordain the summons to contain only one day of compearance for all.

Vol. I. Page 72.

1680. *January* 2. Rev. Mr Abercrombie *against* The Earl of Cassils.

Mr Abercrombie, minister at Maybole, is imprisoned by the Lords, because he offered to take the Earl of Cassils with caption, for two years' stipend he was owing him, after he had presented a bill of suspension, and there was a verbal stop of execution. The bishops somewhat resenting this usage, he being a conformist minister, they got him set at liberty the next day. *Vol. I. Page 72.*

1680. *January* 6. James M'Bride *against* Andrew Bryson.

The point betwixt James M'Bride and Andrew Bryson being reported, the Lords found the declaration under Mr Andrew Bryson's hand a writ valid and probative, and a sufficient exercise of the faculty he had reserved to himself, in his disposition to the said Andrew, of altering and annulling it; and that the said revocation needed no delivery, being in favours of his nearest heirs of line, his sisters, who were *alioqui successuræ*. Only, in respect it wanted writer's name and witnesses, they assigned to the pursuer a day to prove it to be holograph. *Vide 6th January* 1681, *Hepburn*. *Vol. I. Page 72.*

1680. *January* 6. The King *against* The Laird of Luss.

The case of the Laird of Luss his ward and marriage pursued against him at the King's instance, was debated in presence of the Duke of Albany and York. Colquhoun of Luss hath lands holden ward of the King, as also other lands holden ward of the Prince: he taxes the ward and marriage of the lands holden of the King, but not those holden of the Prince. He is now pursued (beside the taxed duties,) likewise to pay L.20,000 Scots, as the avail of his marriage, for the lands holden of the Prince. He oppones his composition and change of holding, upon the faith of Act 58, Parliament 1661.

Replied,—That would defend him if there were a Prince extant; but, failing of him, the lands belong to the King, and so, not being taxed, the Prince is not in the case of a subject here, and therefore the marriage is due.

It seems hard, that the event of the King's not having lawful children should be calamitous, misfortunate, and prejudicial to his subjects.

The Lords having advised the debate on the 9th of January 1680, they repelled the haill defences, and found that the King had right to the avail of the marriage, both the King and Prince being here in one person. So that the King's

orbitas shall be penal to his subjects. *Vide* Dury, *14th January* 1626, *Hamilton;* and *7th July* 1629, *Lord Cathcart.*

This decision was thought strange; since they who have componed for their wards and marriage, with the King, are, by the Act of Parliament 1661, secured that no other superior shall claim any right to the casualty of their marriage. Yet the Lords went upon this ground, that they saw not the erection of the principality; and if the King Erector had been asked to whom the principality should belong, in case he had no son or daughter, law *verisimiliter* presumes he would have answered that the Prince's lands in that case should remain with himself and his successors as his own. See the like presumptions in *L.* 6 *et seq. D. de Pignor.* *Vol. I. Page* 72.

1680. *January* 6. The DUKE of HAMILTON *against* BAILLIE of LAMINGTON.

THIS Baillie of Lamington's goodsire having some lands holden ward of the King, and other lands holden ward of the Duke of Hamilton; he dispones the lands holden ward of the King to this Lamington his grand-son, whereupon he is infeft in his goodsire's lifetime; so that the King had neither the casualty of ward nor marriage to seek. But Duke Hamilton craving his marriage, he being the next ward superior after the King, it was ALLEGED,—Where a vassal holds ward of the King as well as of a subject, that then the subject superior could not crave the marriage. Yet here it was found that Duke Hamilton had right to his marriage: and Lamington was forced to compone with him for it, and gave him L.1000 sterling.

If he had taxed his ward and marriage holden of the King, conform to the 58th Act of Parliament 1661, then he would have been free of Duke Hamilton.

Vol. I. Page 73.

1680. *January* 6. ANENT APPRISINGS.

ONE apprises ward-lands, and is infeft, and dies: his heirs are pursued for the ward and marriage. ALLEGED,—*Absolvitor,* Because he is but an appriser of the reversion, and for the behoof of another whose trustee he is, and to whom he hath given a back-bond; and there is another who hath a comprising consummated by infeftment before him, and so the first appriser only is the King's vassal. REPLIED,—By apprising the reversion, the second appriser is come in place of the heritor, and so the casualty was opened by his decease.

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1680. *January* 6. PARK *against* STORIE.

ONE is cautioner for another *judicio sisti et judicatum solvi;* whereupon being pursued, *pendente lite* the principal party dies, and there is a transferring of

the state of the process raised against his heir. The cautioner compears, and ALLEGES he ought to be freed, because his obligement was personal, and died with the principal party. And the meaning of his accessory obligation is only this, If you had obtained sentence against him in his lifetime, then I was to be liable for it. And where one is cautioner in a suspension, if the decreet be turned into a libel, then the cautioner is free. Stair, *tit.* 10.

Though this allegeance seemed unreasonable to some, yet, it being reported, on the 20th January 1680, the Lords found a cautioner *judicio sisti et judicatum solvi*, liberated, in respect the principal debtor died *pendente lite*, though after litiscontestation; and though the cautioner had delayed its coming to a sentence by advocating the cause.

This seems agreeable to the Roman law, *De Fidejussore judicio sisti et judicatum solvi*; see *Bartholus* and *Broderodii de Repertor. item Accurs. Glossar.*

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1680. *January* 8. ANDREW CADDEL *against* ALEXANDER RIE [of REATH.]

ALEXANDER Rie marrying Andrew Caddel the vintner's daughter; in the contract of marriage Alexander's father is obliged to lay 3000 merks to her tocher, and to provide it to the married couple in liferent and conjunct fee, and to the bairns of the marriage in fee. Within half a year thereafter, the father impetrates a discharge of this 3000 merks from his son. Which discharge being quarrelled by the wife and the son's creditors, Lord Saline found the discharge null and fraudulent, *et contra fidem tabularum nuptialium*, unless Alexander Rie, the father, would either prove the numeration of the money, or the giving his son assignation to sufficient bonds or merchant ware; or, *2do*, will prove that the said sum was reëmployed for the wife and bairns' use, conform to the destination of the contract of marriage. *Vide supra*, 19*th November* 1679, *Wemyss*: and 8*th January* 1679, *Lady Knox*. The father not resting satisfied with Salin's interlocutor, he, on the 21st of January, reported it to the haill Lords; and they found the son's discharge to the father might prejudge himself, but not the obligement for the wife's liferent, nor the son's creditors, though they became only creditors after the discharge was granted; they proving that it was communed betwixt the father and the son, that he should give the father this discharge, (which they referred to the father's oath,) or proving any other collusion betwixt them, which may render the discharge fraudulent; in which case the Lords would not regard it as *contra fidem pactorum dotalium*.

If a man or a woman do any deed betwixt the contract and marriage, derogating from and altering the solemn stipulations contained in the contract matrimonial, the Lords distinguish thus:—Either he or she are free persons, whose parents are dead, and have the disposal of their means in their own hands, and are majors, and have contracted for themselves; or they are minors, and *sub potestate parentum*, and their portion or tocher is *peculium profectitium* from the father or other friend who contracts in the *tabulæ nuptiales*. In this last case, any second latent paction betwixt the contract and marriage, innovating the conditions of the contract, without the consent of the whole other parties contractors and friends, the Lords will incline to find them null; but in the first

case they will sustain them, being done by them who are *sui juris*. *Vide Ann Robertum Rer. Judicat. lib.* 1, *c.* 2, *et lib.* 4, *c.* 1. Durie, *29th November* 1626, *Scot.* *Vol. I. Page* 73.

I HEAR that in 1678 the following case was decided :—A father, in his son's contract of marriage, dispones the fee of lands to him, with the burden of 4000 merks; but, during the ceremony and treating of the marriage, he takes a bond privately from his son, to pay him 6000 merks towards the provision of his younger children. This bond being thereafter quarrelled as *contra pactum dotalitium*, the Lords reduced and annulled the said bond *quoad excessum* of the 2000 merks. *Vol. I. Page* 74.

1680. *January* 8.

IT was debated in a case, where a woman grants a bond betwixt her contract and her marriage; it is clear the bond does not oblige her husband; but *quær.* if she become a free woman afterwards, if she will be liable for the sum therein contained, as being granted by her *ante matrimonium consummatum*; or if the bond will be simply null, as if it were granted by her *stante matrimonio*. This is a very dubious case. *Vol. I. Page* 74.

1677, 1679, *and* 1680. JAMES DOUGLAS, Master of Mordington, *against* JAMES CURRY.

1677. *June* 26.—IN a competition between a tack and a wadset of the lands of Nether-Mordington and Edrington, betwixt James Curry, late Provost of Edinburgh, and Charles Oliphant, one of the under-clerks of Session, this case fell to be debated :—Where a minor grants a deed to his lesion, and the creditor, to secure himself against revocation, causes him, either in the bond or otherwise, swear solemnly he shall never come in the contrary of that deed; *quæritur* whether he should be reponed, and get leave to revoke, notwithstanding of his oath. The canon law is for observing the oath,—*Omne juramentum est servandum quod non tendit in dispendium animæ*; and the religion of it is so great, that none can dispense with it but God, especially *in materia licita*, as here. On the other hand, if the oath be sustained as binding, then adieu to the privilege of minority: *actum est* with all poor minors: they are exposed to the rapacity of every crafty cheat, who has no more to do but to cause his bubble, upon oath, renounce the fence the law has put about him, which he for the present advantage will not fail to do; *eadem enim facilitate juratur qua contrahitur*. And thus, in the most of all the sovereign courts of justice abroad, the oath is relaxed, and the poor minor protected. Yet the priest-ridden Emperor, Fridericus, in the Authentic *Sacramenta Puberum, C. Si adversus Venditionem* (for it is no part of the Roman law, but one of his extravagants,) commands the oath to be kept; and conform to this Authentic have our Lords decided. See Dury, *15th January* 1634, *Hepburne and Seton; last of February* 1637.

See Sir G. M'Keinzie's Thirteenth Pleading for *John Johnston* against *James Hamilton*, p. 155 *et seq.* where he cites another decision on it, 10*th February* 1672, *Wauch.* That authentic is repudiated in France; so Mercier, in his *Remarques du Droit Francois, titulo, De Authoritate Tutorum*, page 56. See Buguion's *Loix Abrogées et Inusitées en France, pag.* And they give this reason of it,—*Ne juramentum sit vinculum iniquitatis.* This point would deserve a Parliamentary decision. However, it seems most consonant to the honour, gravity, and seriousness of our Christian profession that the oath be kept: but, to deter the covetousness of creditors from exacting of it, thereby to prey on minors, the civil sanction should appoint him who takes the oath to be liable in the double of the value, the one to the minor, the other half *nomine pœnæ* to the public; which compensation being introduced for the damage, would obviate that unlawful sort of merchandise, and fully secure minors. This overture is hinted at by the President, in his System, *tit.* 10, Of Conventional Obligations, § *ultimo*. *Vide supra, numero* 579, § 6; *vide infra*, thir same parties.

Advocates' MS. No. 582, *folio* 289.

1677. *December* 11.—The Lords this day advised the debate betwixt Charles Oliphant and James Curry, late Provost of Edinburgh, and the Master of Mordington, which *vide supra, 26th of June* 1677, [*supra.*] The Lords sustained the tack, set by the Master of Mordington to James Curry for thirteen years, and aye and while he should be paid of such a sum, as a valid tack against Charles Oliphant the compriser and singular successor: albeit he alleged, it was to an indefinite ish, and so only personal; as the Lords' decisions had oft found: see Dury, 18*th July* 1621, *Maccall.*

Yet the Lords found this tack real, since it mentioned thirteen years; and had this specialty likewise, that it burdened the tacksman with the public burdens and the minister's stipends.

Charles Oliphant, after pronouncing of this interlocutor, desired the Lords would advise the other point under debate, Whether the minor's oath validated the deed that was null in law, (of which *vide infra*, this same leaf.) And they waving to do it, in regard this decision seemed to determine the whole cause, he offered to take instruments on the state of the process, and that the second point was not yet advised; for which irreverent insolency and impertinence, (as it was judged,) the Lords commanded him to prison, where he lay till next day; and, on his craving pardon, was liberated and re-admitted. See this also in my MS. of the Session affairs, p. 21.

The precise words of this interlocutor, *in terminis* as the clerk wrote it, were thus:—The Lords having considered the debate anent the tack, they sustain the tack, it having a definite ish and a definite duty; a part whereof contained in the tack remains due, after the retention against the singular successor who has right to the tack-duty: and therefore decern in favours of Charles for the dozen of capons, and the other dozen of hens, and for the relief. *Vide* more *infra*, this same page.

Advocates' MS. No. 676, *folio* 311.

1677. *December* 13.—This day the other point of the debate, between Provost Curry and Charles Oliphant, anent the Master of Mordington's oath, given in his minority, was advised; see the head of this page. And the Lords found, an oath given by a minor, past pupillarity, did so bind him, as he, nor any singular successor (who had no right nor *melius jus* than he,) could ever

quarrel it in a reduction or otherwise. But, as to that allegeance, that the deed was *ipso jure* null, he not being authorised therein by his father, who was administrator to him of the law, the Lords, before answer, desired to be informed whether or no he was *in familia* with his father at that time, yea or not.

The terms of this interlocutor, as they were written by Mr John Hay the clerk, run thus:—The Lords find the exception founded upon the oath, relevant against the revocation and reduction founded on the minority; as also find, the minor being debarred from insisting by that oath, and the privilege being personal, Charles Oliphant, who is a singular successor, can have no benefit nor interest to insist upon the said reason of minority. And it having been urged amongst the Lords, that an oath could not confirm an invalid obligation, according to the civil law; and that the obligation granted by the minor to Charles Oliphant, was *ipso jure* invalid, because the father, who authorises the minor, could not be author *in rem suam*, it being for payment of the father's debt:

The Lords, before answer to this nullity, for want of authorising, and the effect of the oath and relation thereto, allow both parties to adduce all witnesses and such evidences as they can, for proving whether the son was in the father's family the time of this right, or lived apart and had a separate estate which he managed apart.

Note.—*Grotius* is for keeping the oath, *libro 2, de Jure Belli et Pacis, cap.* 13, *num.* 16. See the books of Sederunt, *7th of April* 1538, *Naper of Merchinston.* See the other MS. *12th July* 1679, *Mordington* and *Curry*, p. 74. *Vide supra*, [No. 582,] *26th June* 1677, betwixt thir same parties; where this from the Canon law, the authentic *Sacramenta Puberum*, and the 15th psalm, where it is the character of him that shall dwell in Zion, that he swears to his hurt, and changes not, is prettily cleared. They say there are four other decisions besides these, in Dury, conform to this, and sustaining the oath. See *Perezius ad Tit. C. Si adversus venditionem.* See *Elberti Leonini Concilii tertium*; see the other lawyers on the authentic *Sacramenta Puberum. Vide supra*, 13*th February* 1672, *folio* 131.

See Provost Curry's information in this cause beside me, urged from *Covarruvias, Garzias, Craig, Gudelin, Gronvegen, Vinnius, &c.*

Advocates' MS. No. 679, *folio* 311.

1679. *July* 12.—James Douglass, Master of Mordington, being infeft in the lands of Nether-Mordington, and which, though bought in his father's lifetime, yet were acquired with some money left by his grandfather, and so in reason should not pay his father's debt to his prejudice, this being all the Master has left for a livelihood to him, and his lady and family; and, having granted a ratification of a tack of these lands, set by his father to James Currie, late Provost of Edinburgh, aye till he were paid of the sum of ——, the Master raises a reduction of that ratification, as done by him in his minority, to his lesion.

ALLEGED,—He was major the time of the subscribing.—The Lords appointed a conjunct probation, the one to prove he was major, and the other for proving minority. The probation being about to be advised, I alleged, that the probation adduced for the Master was much more convincing and pregnant than Provost Currie's, being more numerous, famous, and positive; whereas his probation was principally made up of three women and my Lord's oath.

Against the feminine testimonies, I represented, from Cavalcanus *de Test.* and others, the several reasons lawyers give why it was reprobated in law, and the difference of the cases of *puerperium et partus suppositus* and lese-majesty, wherein women were habile witnesses, from this. As for his father's oath, no respect ought to be had thereto; 1*mo*, Because ultroneous, and taken without any warrant for it. 2*do*, *Extra territorium*, being taken in Alnwick in England. 3*tio*, A father is not *idoneus testis contra filium*. 4*to*, He may lose or win in the cause, because, if the Master prevail in his reduction, Provost Currie will recur against my Lord upon the warrandice. 5*to*, If it were proper betwixt so near relations, the Master could show most unnatural usage of his father to him. *Item*, Provost Currie's witnesses have deponed upon a son's age, elder than the Master near two years, who was likewise called James; which has given rise to their mistake; and it is credibly informed, that some of them were bribed. As his minority is proven, so his lesion is more palpable than needs to be instructed.

It was ALLEGED for Provost Currie,—That the Master could never pretend minority; because they offered to prove, that, at or before the date of the ratification quarrelled, he had judicially sworn that he was major; which, albeit *res inter alios acta*, yet he can never come against it. *Vide Tit. C. Si minor se major dix.*

The Lords ordained the said judicial oath to be produced, whereby he had asserted himself major.

If Provost Currie count for the rent which these lands paid when he entered first and got his tack, he will be found paid by his possession; but he hath suffered the rent to diminish and fall exceedingly. See 11*th* and 13*th December* 1677, *Oliphant*. See thir parties, 10*th January* 1680.

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1680. *January* 10.—The affair betwixt Provost Currie and the Master of Mordington was this day decided, (*Vide* 12th July 1679,) and the majority was found proven.

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1677 *and* 1680. DAVID MOREIS *against* ORROCK of BALRAM.

1677. *June* 20.—IN a competition between real rights betwixt David Moreis, merchant in Kirkcaldie, and Orrock of Balram, a comprising was quarrelled as null and unformal; because the bond whereupon the apprising was led, bore, that the one half of the sum should not be payable till after the debtor's decease: now the apprising was led for all, and no previous trial taken that the debtor was dead.

ANSWERS,—Offers to prove yet, that the debtor was dead ere the comprising was led, and so the term of payment of the second moiety was come.

The Lords, on Gosfoord's report, found that enough, without a previous cognition, to sustain the apprising as a real right, and give it preference so far as concerned principal sum and annualrents, and necessary expenses, but not as to sheriff-fees or penalties, or the elapsing of a legal; and so restricted it. See 31*st January* 1679, *Irving of Drum*.

Advocates' MS. No. 577, folio 286.

1677. *July* 21.—The registration of a bond was found null, with the inhibition, horning, apprising, and all the other diligence used thereupon, in Moreis and Orrock of Balram's case; because it was registrate within the books of Kirkcaldie, without the jurisdiction where the granter lived, and so was *forum incompetens* to him; and so the extract made no more faith than a mere copy.

The Lords are turning very strict in explaining clauses of registrations now. *Vide supra, February* 1674, *Douglas* against *Parkhead*, No. 442, where the Lords slighted this irregularity. *Advocates' MS. No.* 610, *folio* 294.

1680. *January* 13.—The action Orrock of Balram against Morris in Kirkaldie (20th June 1677,) being reported by Lord Pitmedden; the Lords, in relation to the third and fourth apprisings, led at the instance of John Morris himself, adhered to their last interlocutor, of the 23d Jan. 1678, whereby they found Orrock of Balram free of the termly failyies, but liable to the penalties of the bonds and sheriff-fees in the comprising; (for, by the Act of Parliament 1621, these are due to apprisers, and so the Lords cannot modify nor restrict them, unless there be an informality in the apprising.) But ordain the parties' procurators to be further heard upon the blank ratification produced; as likewise to be further heard as to the apprising led by James Hamilton.

Upon a second report made on the 15th of Jan. thereafter, bearing that the ratification did only relate to the third apprising, which is the first of John Orrock's two apprisings; therefore the Lords adhere to their former interlocutor as to that apprising, and sustained the fourth apprising only for the principal sum, and necessary expenses the party was at: and ordain the parties' procurators to give in an account of the necessary expenses the appriser was at, both as to that apprising and the other apprisings which are restricted to principal sums and annualrents, with power to the reporter to modify the same as he shall find just; notwithstanding of any former interlocutor, appointing ten or fifteen *per cent.* to be modified as expenses.

And the Lords declare, they will hear the parties' procurators upon that point, in relation to the comprising led at the instance of Hamilton, in their own presence, anent this objection, *viz.* That the debtor cannot allow the expenses thereof; because Douny, cedent to the said James, having led an apprising for the same debt, James ought not to have accumulated expenses upon the debtor, by leading a second apprising for the same sum; and so it cannot be allowed to Morris, though he be only a third party deriving right from James Hamilton.

They had formerly sustained this nullity, objected against the other apprisings, that the bonds were registrate in a jurisdiction, *viz.* Kirkaldie and Burntisland, in which the debtor dwelt not. *Vide* 21*st July* 1677.

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1678, 1679, *and* 1680. HELEN DEAS or DAE *against* ISOBEL LINDSAY.

1678. *June* 15.—IF a ground of compensation be repelled in a process where it is proponed by way of exception or defence, that will not hinder but it may be pursued for *via actionis* in a process; and the allegeance of *res hac-*

tenus judicata will not meet that case to exclude it; for many things are receivable by way of action which are not *via replicæ vel exceptionis*, because it may be they are not liquidated nor instantly verified. Thus, in the action between Isobel Lindsay and Helen Dae in Perth, this session, it was alleged, though the Lords had refused to allow Helen Dae's reparations she had bestowed on the apprised tenement, against Lindsay the liferentrix, in their count and reckoning, by way of exception, yet that was not such a *prejudicium* as could hinder Dae from pursuing for these meliorations *via actionis*, and liquidating them; though we opponed the decreet which repelled the said reparations, in so far as concerned the liferentrix her interest, and reserved only action to her against the fiar for the same, and so was clearly in the case of *res hactenus judicata*. And yet this interlocutor may seem strange, and not consonant to the analogy of law, by which the liferentrix is liable for usual reparations, and not the fiar. *Vide infra*, 3*d Jan.* 1679. *Vol. I. Page* 4.

1679. *January* 3.—In the cause betwixt Helen Deas and Isobel Lindsay in Perth, (*vide supra*,) the Lords reponed Lindsay against the decreet, as to any defences she could instantly verify, and that in respect of the precipitation of the extracting the decreet before it was read in the minute book. Thereafter Lindsay craving compensation upon some decreets she had against her son Inglis, who was cedent to Deas; and they pretending it was for aliment, which was to be presumed *ex pietate*; and the same being reported by Newton on the 14th of Feb. 1679:

The Lords allowed the compensation, the suspender Lindsay always producing a renunciation and discharge; and repone Thomas Inglis to his oath against the first decreet, and likewise repone him against the second decreet: and find the said Thomas Inglis liable for the aliment of his elder brother whom he represents, but not for the aliment of his younger brother. And remit to Newton the Ordinary to modify the aliment of the elder brother, as he, after consideration of his condition and means, shall think fit. See 17th Jan. 1680. Anent aliments, see Durie, 27th June 1629, Robertson; and 3d March 1629, Carmichael. See also 1st Feb. 1672, Guthrie; 19th Feb. 1679, Falconar; and 12th Nov. 1679, Cockburn. *Vol. I. Page* 80.

1680. *January* 17.—In the action Helen Deas against Isobel Lindsay, (*vide* 3d Jan. 1679,) the Lords, upon Newton's report, having considered the decreets of cognition of the value of the tenements, and the deposition of the witnesses, they found it proven, that, before the reparations made by Deas, the house paid only £9 Scots; and that after the reparations the houses paid £70 Scots; so that, by the reparation, the free profit of the rent of the houses extended to £61 Scots yearly; and therefore decern the liferentrix, Lindsay, to make payment of the said £61 Scots of all years wherein she possessed the houses, or that the compriser possessed by right from her. And find the expenses of the reparations to extend to 1000 merks Scots; and decern the liferentrix to make payment of 300 merks thereof, and the fiar to pay 700 merks thereof. This decision is at 7 years' purchase of the liferent of 1000 merks. *Vol. I. Page* 75.

1680. *January 22.* WILLIAM AIKMAN *against* JAMES OSWALD.

IN the action betwixt Mr William Aikman, advocate, and James Oswald, it was debated whether or not, to make him a creditor preferable in diligence, as is required by Act of Parliament 1621 against bankrupts, an inhibition be a formal, habile, and legal diligence to affect a moveable sum, or even an heritable sum made moveable by a charge, seeing arrestment is the proper diligence against moveables. *Vol. I. Page* 76.

1680. *January 22.* ANENT a WAGER.

THERE is a wager betwixt two, that one of them shall pay 100 dollars if such a ship arrived at Leith on such a day before 11 o'clock at night. The ship comes in much sooner, and before 11 o'clock at night goes out of the harbour again. The party promiser, being pursued for the 100 dollars, ALLEGED he was free; for the ship was not there at 11 o'clock at night. ANSWERED,—It was there sooner, which satisfied the condition, and the *tempus adjectum* was in his favours. *Vol. I. Page* 76.

1680. *January 27.* SMITON *against* FAIRWEATHER.

SMITON had one thirty-two part of the Calmer ship: he sells it to Fairweather, and gets from him an obligement to warrant him against the reduction of the Admiral's decreet, finding that ship a lawful prize, and of all cost, skaith and damage he may sustain after he is denuded; and Fairweather is to undergo all the hazard. The said decreet being reduced, and the ship freed, and the owners who made vendition of the goods being found liable each of them *in solidum actione exercitoria*, he pursues Fairweather to relieve him, conform to his obligement. He ALLEGED it could extend to no more than what he got.

The Lords found, that he was not obliged to relieve him *in solidum*, but only of the thirty-two part. Some were displeased at this, and thought that the obligement imported all. *Vol. I. Page* 76.

1680. *January 27.* MATTHEW M'KELL *against* JOHN HAMILTON.

IN the case betwixt Mr Matthew M'Kell and John Hamilton, who had married the two daughters of Robert Sandilands; the Lords found the renunciation of all which Rachael could crave, in her contract matrimonial, and the acceptation of the tocher in satisfaction of all bairns' part of gear, imported more than a forisfamiliation, and that it cutted her off from seeking a legitim due *jure sanguinis*, as one of the nearest of kin to her father: as also imported a discharge of substitution in a bond prior to the contract of marriage, whereby, failing of the father by decease, he had provided the sum to her. And they would not allow the writers, witnesses, and communers to be ex-

amined on this, that there was no more intended by that renunciation but only that she should not succeed *ab intestato* as one of his executors. And so Mr M'Kell carried the cause. *Vol. I. Page* 76.

1680. *January* 27. ANENT SUBSTITUTES in TAILYIES.

WHERE one is substitute as an heir of tailyie, and the first is infeft, that infeftment after his death will not serve the substitute, but he must be served heir, though his name is in the first infeftment *per expressum;* nor will that first infeftment hinder the casualty of ward, non-entry, &c. to fall to the superior. *Vol. I. Page* 77.

1680. *January* 27. The RELICT of ROBERT BRUCE *against* The TOWN of INNERKEITHING.

THE cause of the relict of Mr Robert Bruce, Minister at Innerkeithing, against that town, was this day debated. There is a tenement within that burgh-royal, which holds not burgage, but feu of the King: the town stents the inhabitants of it with the rest of the citizens; they suspend that they are not liable, it not being burgage-lands, and the town by their jurisdiction might not take a prisoner out of that house; and they might as well stent my Lord Halton for the house he possesses, which belonged to the Constable of Dundee; and there are Fordel, and other gentlemen, that have houses there in the same case. Craigie gave them the Lords' answer; and, on the 5th February 1680, the Lords found it not liable to be stented by the town, if the heritors of the landward parish and the shire of Fife will compear and allege that it ought to pay with the shire. For hitherto it had, like the concealed lands, paid with neither, but was cast in with other lands and teinds of the Earl of Dumfermline's; who having now sold it, it had never yet received a separate valuation. *Vol. I. Page* 77.

1680. *January* 28. The LORD REGISTER *against* Sir WILLIAM PRIMROSE.

THERE is a bill given in by the Lord Register against Sir William Primrose, bearing, that he, as clerk to the notaries, did not attend, nor call in for the notaries' protocol-books yearly, or after their decease. ALLEGED,—The 22d Act of Parliament 1617 does indeed ordain the notaries to bring in their books to the clerk of register and his depute, but not the clerk to call for them.

The Lords, on the 6th February 1680, found he was obliged to attend personally, and not by a deputy; seeing he was not *delegatus principis, qui potest subdelegare*, but only the clerk register's depute: he could not substitute, notwithstanding that his gift empowered him, unless they could make it appear that it hath been an immemorial custom to serve by a deputy. As also they ordained Craigie and Newton to examine him if he understood the said employ-

ment. All this was done to oblige him to demit; yet we see, in the Clerks of Session, who are not the King's delegates, but only the clerk of register's, they depute the inferior clerks under them; so that the axiom is not infallible.

Again, on the 19th of February, the Lords found, in respect his father had given him the said clerkship, with power to him to call in for the said protocols, and an obligement on him to relieve his father of the hazard of not doing it, that the same imposed a necessity upon him to do it; though, in sense and common grammar, these words, "with power," import no necessity, mandate, or duty, but an arbitrament and faculty to be done or omitted at pleasure; only the rest of the points of his duty run in the same strain, "with power," &c. And, in respect he had neglected to call in for them these thirteen years, therefore they deprived him. It is true, by not calling for them, the lieges, in many cases, suffer irreparably, as in orders of redemption, in intimations, and instruments *ad remanentiam*, and many other instruments, which cannot be made up like seasines, which can be found at the registers. Yet it was never customary for them to do it; and in such things *error communis jus facere debet quoad* bygones: and rational and indifferent men thought that a reprimand or admonition (as is to be used in the case of heretics,) for the future, might have been sufficient. *Vol. I. Page* 79.

1680. *January* 29. SETON of BARNS *against* FINDLAY and CARMICHAEL.

IN the case betwixt Seton of Barns, and Findlay and Carmichael, both brewers in Edinburgh; the Lords having heard the debate reported by Castlehill, they found that the obligement in the contract of victual being to deliver marketable stuff, it was sufficient that the victual delivered was marketable, albeit not sufficient to make malt of; unless it be offered to be proven, *scripto vel juramento*, that it was communed that the victual to be sold was for making of malt: which, if it be proven, then they find it relevant to exclude the reason of suspension anent the insufficiency of the victual, for the charger to offer to prove that the victual is the same which the suspender saw on the charger's barn-floor and girnels, and were satisfied therewith after the bargain was made. And find also the reason not relevant, unless the suspenders allege, that, immediately after they found the victual insufficient, they intimated the same to the charger; and also, that the suspenders prove that the victual, so insufficient, was taken out of the foresaid victual seen in the charger's barn and girnles; and that the said insufficient victual was a part of the victual received by them from the charger and his servants. *Vol. I. Page* 79.

1680. *January* 31. THOMAS WILSON *against* PATRICK HEPBURN.

THE Lords, about ten or eleven years ago, in a case betwixt Thomas Wilson, merchant in Edinburgh, and Patrick Hepburn, apothecary there, found Thomas could not complain of the insufficiency of the bear bought by him, since the skipper, by his receipt under his hand at Dunbar, had acknowledged the

receipt of bolls of good and sufficient victual; which they found obliged the said Thomas. Barns had receipts for all except 18 bolls: which they denying, it was sustained relevant to be proven by his servants who brought it in to them. *Vol. I. Page* 79.

1680. *January* 31. DAULING *against* MATHIE.

IN an action, Dauling against Mathie, a bond was ALLEGED to be wrong registrate in the bailie court-books of Edinburgh; whereas the parties dwell in the Pleasants, at the Cowgate-port, which lies within the regality of Broughton, and answers with the shire; and should either have been registrate in the sheriff-court books, or in the books of the Canongate. *Vol. I. Page* 79.

1680 *and* 1681. PHILIP VAN PORTEN *against* ANDREW DICK and OTHERS.

1680. *January* 31.—IN the case betwixt Philip Van Porten, and Andrew Dick and Others, anent the ship taken by Captain Martine from the merchants of Hamburgh, the intromitters with the goods being pursued, the Lords found, 1*mo*, That it ought to be proven the goods were piratically taken; and found the Admiral's decreet not sufficient to prove it, but required the oaths of the seamen and other habile witnesses who were robbed. Now, they dwelt in Hamburgh, and might be dead. 2*do*, That the cautioners for the privateer who took the said ship behoved to be discussed before the intromitters with the goods. 3*tio*, Ordained the stranger to prove and adduce the laws and customs of the other nations in Europe, that the Lords may see what is the *jus gentium* in making intromitters *bona fide* with goods robbed at sea liable for restitution, and if it be *vitium reale*. For, in goods stolen by land, it is certainly an inherent vice, and they are recoverable, *rei vindicatione*, wheresoever they are found. 4*to*, They reserved to themselves to consider if it should assoilyie the intromitters, that the owners had once Captain Martine, the pirate, prisoner in Edinburgh, where he escaped in woman's apparel; and again prisoner at London, where they consented to his liberation. This was thought an odd and wimpled interlocutor. *Vide Zeigler. ad Grotium de Jure Belli, p.* 548.

The late author of *Jus Maritimum, c.* 4, Of Piracy, shows that the buyers of caped goods in England are not liable in restitution; but our countryman, Wellwod, in his Sea-Laws, c. 25, Of things taken on the Sea, shows a decision to the contrary; but it is in 1487, near 200 years old.

Nota.—Upon the 19th day of January 1681, the Lords having advised the probation taken at Hamburgh, with a complimenting letter from the magistrates to the Lords, thanking them for their justice; the Lords found the robbery to have been clearly done *in alto mari* by Captain Martine, and therefore decerned Captain Dick the intromitter with the robbed goods to restore *in quantum lucratus*. His oath being taken, he deponed he had paid so much to Martine, the robber. Several of the Lords voted that this ought not to be discounted nor allowed to him, because he was *in pessima fide* to buy such goods before

they were declared lawful prize, being presumable they were caped. Yet the plurality of the Lords allowed this article to him, seeing he could not be said to be *lucratus*, except the price paid out by him were first deduced. The witnesses in this cause were the shipmen who were aboard the time of the robbery.

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1680. *January* 31. The EARL of SOUTHESK *against* BOSWELL.

IT was thought, though a reason of suspension ought to be instantly verified, yet a reply or duply in a suspension (which is also *pars libelli*,) needs not, since it may be emergent, and the proponer cannot come *paratus et instructus* to verify it: which is also Stair's opinion, in his Form of Process.

Yet, this point being reported on the 5th of Feb. 1680, the Lords found a reply upon re-compensation ought to be verified instantly, being in a suspension which was turned to a count and reckoning. This many thought strange; yet compensations should be instantly verified, especially in suspensions.

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1680. *January* 31. HAMILTON of BANGOUR *against* ALEXANDER HAMILTON.

IN the action betwixt Hamilton of Bangour and Mr Alexander Hamilton, upon the Lady's liferent, a bill having been given in against Mr William Hamilton, advocate, for exhibiting summarily some writs in his hands, because he was a member of the house; the Lords, *maxime refragante Præside*, refused it, because he had not these papers consigned in his hands as an advocate, but as uncle and tutor to the children, and here was to be considered *tanquam quilibet*.

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1680. *January* 31. DUNCAN FORBES *against* EDGAR of WEATHERLY.

JOHN Edgar of Weatherly grants a bond to his brother, Mr William, for 500 merks *per annum*, and, in case he married, he adds 300 merks more,—in all, 800 merks; and, if he have children, then John obliges himself to pay him 6000 merks; and, if he died without leaving any children behind him, then he is to pay him 4000 merks only. Mr William assigns this bond to Nicol Edgar, another brother, and dies without ever being married, and so without children. Mr Duncan, having married Nicol's daughter, craves the 4000 merks provided *in eum casum* that Mr William should have no children.

ALLEGED,—The clause is only to be understood if he had been married, and then had deceased without bairns: but *ita est*, he was never married, and so the condition never existed.

ANSWERED,—The clause is general, and is opponed, and comprehends *casum*

utrumque. This was not decided, but transacted. It was *casus judicis arbitrarius. Vide infra, 18th June* 1680, *Oswald.* *Vol. I. Page* 80.

1680. *February* 3. JAMES SUTHERLAND *against* JOHN GALLOWAY.

IN the case betwixt James Sutherland, late Treasurer in Edinburgh, and John Galloway, the Lords shunned to determine whether or not the Town of Edinburgh might legally and warrantably imprison the tacksmen of their common good, and their cautioners, summarily, for their deficiency in payment, without registrating their tack or charging them thereon; in respect not only Edinburgh, but likewise the other royal burghs, are in constant use to imprison summarily, providing it be for their common good allenarly. *Vol. I. Page* 81.

1680. *February* 3. JOHN JONES, Procurator-Fiscal of Glasgow, *against* —— WOOD, Relict of Bailie Fairie.

IN the action betwixt John Jones, Procurator-Fiscal of Glasgow, and —— Wood, relict of Bailie Fairie there; she ALLEGED, Though she had no right nor assignation to the reversion, yet she, as liferentrix of the tenement, might redeem Jones's infeftment of annualrent, and so remove impediments that hindered her from possessing.

ANSWERED,—*Esto* she did redeem, she must ascribe her possession, *primo loco*, to the extinguishing of this infeftment of annualrent; for, if she should bruik for her liferent, and suffer this annualrent to run up unpaid, if she lived eight or nine years, it would exhaust and absorb the whole value of the tenement; and so would recur against the fee which the said Jones had acquired from the heir, and so, in process of time, would render his fee unprofitable; which iniquity she ought not to be permitted to do.

This case being reported on the 5th of Feb. 1680, the Lords found, that Jones's infeftment of annualrent was preferable to her liferent, and that, if she redeemed, she behoved to ascribe her possession *primo loco* to the said annualrent; and, if the rent of the tenement exceeded the said annualrent, then to her liferent *pro reliquo*: and found his infeftment of annualrent preferable to her, both *quoad* the annualrent and the stock or principal sum.

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1680. *February* 3. ANENT A CHAPLAIN GOING TO CONVENTICLES.

A CHAPLAIN pursues for his year's fee. ALLEGED,—After you had staid three or four months in my house, I discovered that you went to conventicles; and so, by the Acts of Parliament and Privy Council, I was not *in tuto* to keep you; and therefore I put you from my service, and I am willing to pay *pro rata temporis* that you staid.

ANSWERED,—The King's indemnity purges and pardons his going to conven-

ticles in time past, *esto* he had gone; and *per eum non stetit* that he abode not the whole time.

The Lords decerned for the whole year's salary. *Vol. I. Page* 81.

1680. *February* 4. The Duke of Hamilton *against* The Town of Linlithgow.

Duke Hamilton raises a declarator against the Town of Linlithgow, that he had the liberty and privilege of a free port and harbour at his regality of Borrowstowness, and might load and unload there, notwithstanding that the King's customhouse, which hath been these thirty years at Borrowstowness, is now removed to Blackness, and that the Town of Linlithgow are building a pier and harbour at Blackness.

Alleged,—By the 84th Act, Parl. 1503, and 24th Act, Parl. 1633, the merchants must only pack and peil at free burghs: now, loading and unloading is the same thing with packing and peiling: (This was denied by the Duke's advocates, who called "packing" the stowing of goods in packs, and "peiling" they did not agree what it meant: some thought it was the furring of goods like a pile of wood:) and Borrowstowness is not a free burgh.

Answered,—By the Act of Parliament 1672, burghs of regality and barony have all the privileges of burghs royal, except as to some staple commodities, and so may load and unload. *2do*, Blackness is not so commodious a haven as Borrowstowness.

Replied,—Since that fatal Act of Parliament, the burghs have ever reeled, as exceedingly abridged in their privileges; but it does not extend to this case; and Blackness is a more convenient station for ships.

This being advised on the 10th of Feb. the Lords, before answer, ordained a visitation to be made of both harbours, and whether Blackness is a more capacious and secure receptacle for ships than the other; as also probation to be led anent the Town of Linlithgow's possession and custom of going, loading, or unloading at Blackness, or at Borrowstowness. *Vol. I. Page* 81.

1680. *February* 4. Anent the Prescription of Servants' Wages.

One having served fifteen or twenty years; within a year after leaving the service, pursues for all the fees, and offered to prove the service by witnesses, like a current account, whereof the last article is within three years.

Replied,—It is not alike; for, in current accounts, it is not presumed that any of the articles are paid; but it is otherwise in servants' fees. And, at this rate, a minister might pursue for twenty years' stipend back, since he was minister there, and, in respect of the currency, pretend that the years above three are not prescribed, and make them pay it if they want the discharges, seeing, *quoad modum probandi*, he may prove it by witnesses; which were dangerous and absurd. This went to the Lords' answer. *Vol. I. Page* 82.

1680. *February* 4. SOPHIA JOHNSTON *against* MURRAY of ROMANO.

A CAUTIONER in a bond is pursued for the principal sum, and the annualrents of it for thirty years past.

ALLEGED, for the cautioner,—1*mo*, That he could be bound for no more *nec in ampliorem summam* than the principal; but *ita est* the bond will only subsist against the principal for £100 Scots, because it is only subscribed by one notary for him: *ergo*, I can be liable in no more, though I have subscribed for myself.

Yet there are cases in law where the principal may be free, and yet the cautioner bound, and the cautioner farther bound than the principal; *viz.* where the principal is bound *obligatione naturali tantum*, he is free of any civil exaction; such as a pupil, a wife, &c. yet cautioners for them are civilly liable.

The Lords demurred on this point: and, though they did not decide it at this time, yet they were of opinion, that, the cautioner being bound conjunctly and severally, and so being *correus debendi*, he was liable for the whole.

The Lords afterwards found the cautioner bound for the whole, though the principal was only liable for £100 Scots; because the cautioner, when he subscribed, should have so far considered his own security as to see two notaries subscribe; or he might have caused distress the principal in his own lifetime, when the debt was probable by his oath, and so not have lost his relief.

The second defence was,—I can be decerned for one year's annualrent only; for the bond is taxative, and provides no more but one year's annualrent of it; and the *mora* of the principal debtor, in not paying you the principal sum, (which you should have charged for, or denounced him, and then, *vi statuti*, it would have borne annualrent,) cannot infer against the cautioner *obligationem usurarum*. Though the paying of a year's annualrent, where there was none due, infers *etiam pro futuro*: Dury, *2d December* 1628, *Yair*.

This being taken to interlocutor, on the 11th of Feb. the Lords found, since the bond bore, "with annualrent to the term of payment," and without mentioning annualrent after the term, yet he, being *in mora* of paying the principal sum, he behoved to pay annualrent; and that clause, "with annualrent after the term of payment," was presumed to be the meaning of the parties, and only by negligence omitted. *Vol. I. Page* 82.

1680. *February* 4. MARY KINCAID *against* JOHN ELLIS.

IN their competition, the Lords find Elieston's right being only subscribed by the husbands, and not by Duke Hamilton's daughters, it can extend to no heritable right, but only to moveables which fall under the *jus mariti*; and the husband's obligement to cause the Ladies subscribe is only personal. As also found, the back-bond granted by Mary Kincaid to Sir James Cockburn, who first bought the lands of Wariston, equivalent to an intimation of their rights, and which was prior to Elieston's intimation of his right of assignation to James Gray, who thereafter acquired these lands of Wariston from Cockburn. *Vol. I. Page* 83.

1680. *February* 4. BOYL of Kelburn *against* JAMES STEWART of ASHCOG.

BOYL of Kelburn against Mr James Stewart of Ashcog, advocate, complaining upon him in 15 or 16 articles of malversation; as compearing against clients from whom he had pensions, and taking bonds *de quota litis*, and assignations to pleas; and taking a bond of man-rent, from one to ride with him, vote with him, &c. contrary to the acts of Parliament. *Vol. I. Page* 83.

1680. *February* 4. HARY OSBORN and MILL *against* ——————.

THERE is a comprising led, and assigned; thereafter it expires; then the assignee pursues for maills and duties.

ALLEGED,—The apprising was extinct, because the cedent who led it was debtor in greater sums to the party against whom it was led; and compensation is *vice solutionis*; and so within the legal it extinguishes. *2do*, Expired comprisings are odious.

ANSWERED,—1*mo*, The grounds of the compensation are not *ejusdem speciei*; for the comprising is an heritable right, and thir bonds are moveable. *2do*, The debtor's executors may claim thir sums, because they fall under executry; and so he must be secured against them.

Where a back-bond is granted by an appriser before he is infeft, it affects the comprising though it be assigned to a singular successor; because the comprising is as yet a personal right: but if the back-bond shall be granted by the appriser after he is infeft, it is no more real against the assignee, but only a personal obligement upon the granter. *Vide* Durie, 10*th March* 1629, *Schaw*.

Where an appriser within the legal sells a part of the apprised lands, the price whereof might pay him the sums contained in his comprising, but in the disposition he reserves his right to the rest of the apprised lands; the Lords found, the legal expiring without any order used against him, he might recur to the rest, because of the said reservation; although it was alleged that the reservation was *præstatio contraria facto*. *Vol. I. Page* 83.

1680. *February* 12. HAMILTON *against* PATRICK CUNNINGHAM.

IN the action Hamilton against Mr Patrick Cunningham, agent; where a discharge mentions a small particular, and then adjects a general clause, the general will extend to no sums of greater value than the particular expressed is. But there is a distinction to be adverted to here; for, if the general clause precede the special, and then some particulars be adjected, the foresaid presumption will not take place; but the general will comprehend all things: but where the general follows a special clause, there by interpretation it is stretched no farther than the value of the special. *Vol. I. Page* 84.

1680. *February* 13. FAIRY *against* KER.

IN a cause betwixt Fairy and Ker, the Lords declared they would hear this point, in their own presence, Whether one who robbed a horse in the late rebellion 1679, be secure by the act of indemnity from restitution, I think, if he were pursued as a thief criminally for his life, that Act would defend him; but it seems not reason, that, only being convened *rei vindicatione* either for restitution or *ad damnum et interesse* for the price, &c. that he should go free; for the king only pardoned *vindicta et interesse publicum;* but not *interesse privatum*, as was found in William Cockburn's case, *supra*. [Historical volume, 20th September 1679.]

Yet it was ALLEGED, the king, in some cases after a war, (but I think this is only to be understood in a foreign, not in a civil war,) may remit, *ob bonum publicum*, private men's interests: *2do*, Having pardoned the rebellion, he consequently forgives all the lesser crimes as accessory thereto; and stealing of horses was but a part of the rebellion, which had *tractum temporis*, and was only done in order thereto. *Vol. I. Page 85.*

1680. *February* 13. MARY BUCHANAN *against* The LAIRD of BUCHANAN'S HEIRS.

MARY Buchanan craves adjudication of her father the Laird of Buchanan's lands, upon a bond of provision for 20,000 merks.

ALLEGED,—The bond is conditional, if she married with her father's consent, and failing of him, with consent of such friends as he substituted: but *ita est* she had married, without his consent, Stewart of Ardvalloch, whose predecessors were at feud with their family. ANSWERED,—1*mo*, The bond *quoad* L.10,000 must be valid, because, by her mother's contract of marriage, the daughter was provided to as much. *2do*, The bond as to the other 5000 merks must subsist, because *conditiones appositæ ad restringendum matrimonii libertatem* are *inutiles* and rejected. (See Swinburn, and Godolphin, upon last wills and testaments.) And her father was determined to marry her to George Grant, (to whom he had disponed his estate, and passed by his own relations;) and she could not love him. REPLIED,—Conditions prohibiting marriage simply are indeed reprobated, or if they run only to marry one man; but not if they be conceived *ne Titio vel Sæio nubat;* see Craig *p.* 161, *de Conditionibus matrimonio appositis;* and to say, you shall not marry without the father's consent, is such an honest condition, that, though it were not adjected, it is inherent both by the laws of God and man: and, *esto* she was not obliged to follow her father's advice, she was bound, at least, to have asked it. DUPLIED,—He was of a weak judgment, and not very right, and so it was needless to ask counsel from him. TRIPLIED, Then she was obliged to have asked the substitute's consent, the father being *quasi civiliter mortuus. Vide Perez, ad tit. C. de indicta Viduitate.*

The Lords found, she ought not to have the 5000 merks, because she did not perform the conditions, and ask her father's consent; which they found

she was at least obliged to do, since it is possible she might have persuaded her father to consent; unless she will prove that he was *non suæ mentis*, or she will condescend upon some other relevant reason why she needed not seek it.

If a father shall give his child a bond for 10,000 merks, with this quality, In case he or she marry without his consent, that then the bond shall be absolutely null; it is thought this is an unlawful quality and condition: but if it bear, that he restricts the 10,000 merks to 5000 merks, in case of their marriage without his consent, the bond in that case will only be sustained for the 5000 merks; for that doth not absolutely impede their marriage, nor render them destitute of an aliment. *Vol. I. Page 85.*

1680. *February* 13. The Reverend John Birny *against* The Heritors of Carlaverock.

Mr John Birny, minister at Carlaverock, amongst other vicarage-teinds, craves likewise the teind of a weaver's loom, in respect of the custom in that parish of paying teind *ex isto textrinæ artificio*; as also, he craved the vicarage of the salt gained at the sea-side, made and cast up by the sun; *nam decimæ minores sunt locales*.

The Lords found these due, in respect of the probation of the forty years' possession by him and his predecessors, ministers at that church, though he was competently provided without this. See *21st June* 1649, *Charles Lumsden, Minister at Duddingston*, claiming the teind of tobacco which once grew there: as also, for thir unusual teinds, elegant decisions in Basnage's Comment. on the reformed Customs of Normandy, p. 22. *Vol. I. Page 85.*

1680. *February* 13. William Lockhart *against* Cromwell Lockhart of Lee.

In the cause, William Lockhart against Cromwell Lockhart of Lee, a declinator was given in against Lord Castlehill, his uncle; as also, because it was *in causa tangente famam patris*: yet the Lords rejected the declinator.

Vol. I. Page 85.

1680. *February* 13. Anent the Sealing of Signatures.

In a competition betwixt two base infeftments confirmed, the one craves preference to the other, because, though both their signatures were presented and past in one day, yet his was sealed three or four days before the other. This was taken to interlocutor by Castlehill. But I think the date of the passing the signatures is the rule of preference, or the coming in *pari passu*; and not the appending the seal, though it should be delayed for several months.

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1680. *February* 13. ——— *against* The Master of Salton.

The Master of Salton being pursued by his servant, the Lords would not modify any fee to him, unless he will offer to prove the paction to serve for a fee; since he might undertake to serve only for his meat. Yet it may justly be presumed he served for a fee; *nam non præsumitur quis operas suas temere jactare velle.* *Vol. I. Page* 86.

1680. *February* 13. Edward Gillespie *against* Home of Eccles.

In Edward Gillespie's case against Home of Eccles; where one pursues for maills and duties, and, *pendente lite*, accepts of his bygone annualrents, he cannot insist and crave a decreet against the tenants in time coming, unless there be at least a term's annualrent owing; for it is not known if that tenant shall remain there as tenant, when the same shall become due, yea or not.

Vol. I. Page 86.

Anent Adjudications.

Adjudications on the Act of Parliament 1672, are summarily called and decerned without enrolling; but adjudications upon renunciations to be heir, and special adjudications *ad factum præstandum*, as to fulfil a disposition, must be enrolled *in communi forma;* unless the pursuer instruct that he is running for diligence, and that there are adjudications past against that same person before him. See *December* 1675, [page 54, *Nasmith.*] *Vol. I. Page* 86.

1680. *February* 13. Alexander Lessils *against* James Rankin.

Betwixt Alexander Lessils, master, and James Rankin, apprentice; the Lords found, that the Dean of Guild of Edinburgh, upon a reference and submission made to him, could not appoint the indentures to be torn; and that it was not a sufficient ground for a master to thrust his apprentice out of his service, that he, after many admonitions, still lay long in his bed, and refused to carry his master's bible to the church, or was once drunk; but only allowed him moderately to chastise him for these or the like faults: but found it a relevant cause to put him from his service, that he offered to prove the boy was hypochondriac, and sometimes furious, and thereby incapable and unserviceable. See 21*st February* 1671. *Vol. I. Page* 86.

1680. *February* 19. ——— *against* Macklellan.

In an action against Macklellan, beadle of the chapel-royal, the Lords made

the printed Act of Sederunt anent renunciations of infeftments after the renouncer was inhibited. *Vol. I. Page* 86.

1680. *February* 19. ANENT the LONG PRESCRIPTION.

IT was debated, though bonds prescribe after forty years, if not pursued for, yet what if one be out of the country near forty years, and, after the forty years, he pursue for the debt, and do not make use of the bond which is prescribed, but refer the forty years old debt to his oath; will he be obliged to pay, if he compear, and swear that he was once indeed owing that debt, but that it is past forty years since it was lent; will the grand prescription assoilyie him? I think it will. *Vol. I. Page* 86.

1680. *February* 20. PHILIP NISBET *against* STEPHEN BRUNTSFIELD.

IN this action, the Lords found, on report, that the subscribed account produced is not sufficient to infer a debt against the defender, unless the pursuer will instruct, either by the defender's oath, or by witnesses, that the salmon contained in the subscribed account was meddled with by the defender's father after the date of the discharge, *in anno* 1665, of the copartnery betwixt them, produced in process; and repel the exception of the nullity proponed against the account, as wanting writer's name and witnesses, in respect of the answers made thereto, *viz.* that, there being four parties subscribers, they are witnesses one to another; and, 2*do*, that it is *in re mercatoria*. See the contrary, Dury, 14*th Feb.* 1663, *Rankine*.

So the discharge 1665 cuts off the counting for any salmon preceding its date; but they allow the pursuer to prove thir salmon in the account 1669 were furnished after the said discharge. *Vol. I. Page* 86.

1680. *February* 20. BOTHWEL of GLENCORSE, and the CHILDREN of SIR ROBERT PRESTON, *against* JOHN LUTFOOT, W. S.

IN an action betwixt Bothwel of Glencorse, and the Children of Sir Robert Preston, against John Lutfoot, Writer to the Signet, the Lords found, that the forty years' prescription began to run against an inhibition from the date of the last execution, and not from the date of the registration thereof, as was alleged it ought only to be counted: *ut sic valeret actus;* and prescription, which is odious, might be evited. *Vide* a remark anent Registration of Writs, [page 298.] *Vol. I. Page* 86.

1680. *February* 20. MARION AITKEN *against* WILLIAM HAMILTON.

IN an advocation raised by Marion Aitken against William Hamilton, the

Lords remitted it back to the bailies, because there was litiscontestation in the cause, though they had raised a blank reduction of that Act; and the Lords found no iniquity in sustaining process against her, notwithstanding of her absolvitor, and her exception of *res hactenus judicata*, because she was now convened by him *super alio medio*. Yet *Petrus de Ferrariis*, and the doctors, think a man by pursuing, *omne suum jus in libellum deducit*, and an absolvitor should terminate all. See 10*th Jan.* 1627, *Thornton.* *Vol. I. Page* 86.

ANENT turning DECREETS into LIBELS.

THERE is a great difference betwixt turning a decreet into a libel, and debating the cause as if they were in a libel; for, in the first case, the denunciation, and all the diligence used thereon, falls; in the second it stands, if the letters shall be found orderly proceeded. *2do*, If a decreet be turned into a libel, then the cautioner in the suspension is free; but not so in the other case.

Vol. I. Page 87.

1680. LORD CARDROSS *against* JOHN MAITLAND.

January 21.—JOHN Maitland, second son to my Lord Halton, having married my Lord Kilmawers' daughter, and Stewart of Kirkhill's grandchild, obtains from the King the gift of Lord Cardross (who had married Kirkhill's other daughter,) his liferent escheat, upon a horning, whereof Cardross had paid the debt, but neglected to relax, or to take a gift. The narrative of the gift proceeds upon four or five grounds of equity, *viz.* the great services done by the donatar's father, and his uncle the Duke of Lauderdale, and their predecessors, and other good offices done by them to the Crown. *Item*, For the worthy memory of Chancellor Glencairn, her grandfather. *Item*, Because, contrary to law, the equal half of Kirkhill's estate, by tailyies and back-bonds and other such fraudulent means, hath been conveyed away from the Lady Kilmawers and her daughter, (to whom the half of the succession, by the law of God and nature, belonged,) and are enhanced by my Lady Cardross and her Lord. *Vide infra, 24th February* 1680. *Vol. I. Page* 76.

February 24.—The Lord Cardross having raised an improbation of the charge and execution of horning, whereon his escheat is gifted to John Maitland, (*vide* 21st Jan. 1680,) he gave in a bill, craving a commission for examining the witnesses in the messenger's execution, to lie *in retentis*, least they should die before June.

The Lords refused it, because it did not appear that they were old or valetudinary. *Vide 4th June* 1680. *Vol. I. Page* 87.

1677, 1679, *and* 1680. JAMES HAMILTON of MANNER ELEISTON *against* JOHN ELIES of ELIESTON.

1677. *February* 8.—THIS day, James Hamilton of Manner Eleiston gave in a complaint to the Secret Council against Mr John Eleis, elder of Eleiston, ad-

vocate; representing that Mr John had the absolute trust of all his affairs and papers, and drew up what writs and contracts he pleased betwixt them, and entered to the possession of his haill lands, and might have been paid by his intromission ere now; and he, being a stranger, had not whereon to prosecute his count and reckoning, except a part of his own were allotted him; therefore craved, during the dependance, they would allot him an aliment, and ordain the charter-kist to be inventaried, &c. (See thir parties, on the 31*st of January* 1679.)

Though it was alleged that this was altogether a Session business, and nothing to make it competent before the Council, yet the Council (who resolve to enhance all matters, and insignificate both Session and Justice Courts, of which see an observe *alibi*,) referred it so to the Session as they should instantly call the parties, and, without a libel *aliove strepitu seu figura judicii*, name an auditor, and ordain them to count and reckon; and, with all conveniency, to report what they found in the matter to the Council again: which was to make them judges to counts and reckonings, and that above the Session.

Glendoick being named auditor, and, in sundry meetings, a charge and discharge being produced before him, and objections on either side, there were sundry points whereon he gave them the Lords' answer; whose interlocutor was this:—28th February 1677, The Lords having heard the report of the Lord Glendoick, auditor, as to the articles after mentioned, and as to that article of the £800 of vicarage-teinds: in regard the subscribed count betwixt them bears expressly that sum to be for the vicarage, and that it is granted by both parties the vicarage is not evicted, they refuse to allow that article to Mr John Eleis, defender, unless he will offer to prove, *scripto vel juramento* of the pursuer, that albeit the count bears the said sum to be allowed for the vicarage, yet it was agreed the same should be allowed for the benefit of the compositions procured by the defender from the pursuer's creditors. And assoilyie the defender from that article anent David Spence, the factor, who is yet owing £800; in regard the defender, by the contract, is only liable for his actual intromissions.

As to the third article, anent the annualrents of the 10,000 merks due upon the wadsets of Shawfield, the Lords find the defender liable only for the annualrent of the said 10,000 merks since Martinmas 1666; unless the pursuer will offer him to prove, by the defender's oath, that, albeit the securities were not perfyted till September or November, yet the money was actually paid unto him at the Whitsunday preceding.

Thereafter, Squire Hamilton gave in a petition to the Council, on the 6th of March, showing the Session was up; the count could not be closed; and he was necessitous; and there were 6000 merks in the tenants' hands, lying ready to perish; and the rent was worth 4000 merks *per annum*, &c.

The Lords, by Atholl's moyen, the President opposing it, modified to him 3000 merks of that which was in the tenants' hands; and ordained the charter-kist to be exhibited in their clerk's hands, and inventaried; and Mr John to depone he had abstracted none of the writs.

Advocates' MS. No. 542, folio 275.

1679. *January* 31.—In the count and reckoning betwixt Mr John Elis of Elieston and James Hamilton, (8th Feb. 1677,) James alleging, Elieston had got back a 1000 merks' bond, wherein Mr John was debtor to him in trust, and craved that Mr John might hold account to him thereof; and this being re-

ferred to Mr John's oath, he deponed the said bond was given him back as a free donation. It being objected against his oath, that, James being his debtor at the time, *nemo præsumitur donare quamdiu debet :*

This being reported to the Lords, they found Mr John's oath did not prove the allegeance, and therefore assoilyied him : for the brocard *debitor non præsumitur donare* is but presumptive, and the probability of it was clearly elided here, by Mr John's positive oath that it was gifted. Though a debtor is not presumed to gift, law doth not hinder him to gift to his creditor, providing he clearly express it. See *12th November* 1679, *Andersons*. *Vide Pape* and *Young* *17th January* 1679.

James also alleged, that Elieston had got greater eases from the said James's creditors, with whom he had compounded, than he had stated to him in his account.

This the Lords found relevant, in respect Mr John was obliged to communicate to James the benefit of the abatements ; and therefore ordained Mr John to depone thereanent, in presence of those creditors who gave the compositions. Which he did, and denied that he got any more down than what he had inserted in his accounts. *Vide infra*, 19*th Dec.* 1679. *Vol. I. Page* 39.

1679. *December* 19.—In Mr John Elies of Elieston's case with Hamilton, (31st Jan. 1679,) a sheet of Eliston's disposition to his lady and children, containing his faculty to alter it, was quarrelled, as having been lately inserted by him, and as not being in it *ab initio ;* and so he could not securely pay to Elieston, his children and lady being infeft.

The Lords, before answer, ordained the writer and witnesses in the disposition to be examined what they knew of the alteration of that sheet. *Vide infra*, *25th February* 1680. *Vol. I. Page* 71.

1680. *February 25.*—Upon a bill given in by Mr John Elies of Elieston, the Lords repone him again to the possession, aye and until he be paid of the sums found due to him by the count and reckoning ; and that notwithstanding the Lords of Privy Council had, at two several times, given Squire Hamilton 3000 merks out of that estate, upon caution to refund it if he were found Elieston's debtor. *Vide supra*, 19*th Dec.* 1679. *Vol. I. Page* 90.

1680. *February 25.* CUNNINGHAM *against* CUNNINGHAM of ENTERKIN, his Father.

THE Lords inclined to assoilyie Cunningham of Enterkin from his son's pursuit, and found he had fulfilled the contract of marriage to him ; and ordain the son to pay the 50,000 merks of provision to the younger children contained in the contract. Against which provision the son reclaimed, alleging he was then minor, and was circumvened in it. *Vol. I. Page* 90.

1680. *February 25.* PATRICK HEPBURN *against* The EARL of LOTHIAN.

THE cause, Patrick Hepburn, apothecary, against the Earl of Lothian, was debated. Lothian had renewed his father's bond with this quality, If Patrick

would procure him a new gift and confirmation for collecting the annuity; as also allowing and deducing to him, in the first end of his intromissions, the expenses he shall be at: in which account the Earl gives up 18,000 merks *per annum*, spent by him and his lady and family, by staying sometimes at Edinburgh and whiles in the country.

REPLIED,—He behoved to have lived in the rank and quality of a nobleman whether he had been collector of the king's annuity or not; and if all this were to come off the king, then it were the king's interest rather to commit the trust of collecting and in-gathering of his rents to meaner persons, who could live upon 3000 merks by year. *2do*, The clause anent the expenses must be only understood of the extraordinary expenses he is put to in pursuing for and collecting it.

Halton was declined by Lothian as one of the Lords of the Treasury, and this point dipped somewhat upon the king's interest. But the Lords found he sat and voted with them only as a Lord of the Session; and therefore they rejected it. He also gave in a declinator against the Register, and Harcours, who had married the pursuer's wife's aunt, and sister; but the declinator was not admitted. For declining of Newbyth, it was offered to be proven by his oath, that he had been verbally solicited, by Mr Patrick Home; conform to the late Act. The Lords waved this point, as being of a dangerous preparative. *Vol. I. Page* 90.

1680. *February 25.*

THERE being a great clamour and outcry against the extortion used at the Chancery, the Lords appointed a visitation to be made, and the Register, &c. to try the abuses and exorbitant exactions there. George Cockburn, the depute, would not bide the trial; and so Sir William Ker placed John Campbell the writer therein. Some demand why they pass free for bygones, seeing we hang men for very small thefts. *Vol. I. Page* 90.

1680. *February 27.* The KING'S DONATAR *against* PATRICK YEOMAN of DRYBURGH'S HEIR.

THE King's Donatar pursues Mr Patrick Yeoman of Dryburgh's heir for the avail of his marriage, his father having died infeft in ward-lands.

ALLEGED,—He only had apprised ward-lands, the legal whereof was not expired, and the sum was satisfied by payment, at least by intromission within the legal; and so, his apprising and infeftment being extinct, the ward could not fall. ANSWERED,—The extinction of the apprising by intromission, if it had been prior to the vassal's death, would liberate; but the extinction of an apprising after the casualty is devolved to the king, and there is a *jus quæsitum* to him, after that it ought not to prejudge the king.

The Lords found the casualty of marriage and ward due: which interlocutor they ratified 28th July 1680.

Quæritur whether lands fall in ward by the reverser's death during the legal, seeing he is not yet fully denuded of the property.

An apprising is only *pignus prætorium*, and a security answerable to that in the Roman law called *missio in possessionem ex secundo decreto*, and not a right of property, till the legal expire; and, therefore, in charters on apprisings, they are bound to pass a new one after the legal. And what if there were twenty apprisers within year and day of ward-lands? shall the superior have right to every one of their marriages? *Vol. I. Page* 90.

1680. *February 27.* Sir GEORGE KINNAIRD of that ilk, Petitioner.

SIR George Kinnaird of that ilk being nominated by Dr Yeaman tutor to his children, together with his brother and Dryburgh; and they two, who were made *sine quibus non*, being both dead, Sir George gives in a bill to the Session, craving he might be liberated of his acceptation of that tutory-testamentar, in regard it was now impracticable, the two persons by whose advice he was adstricted to act being both dead.

The Lords freed him of that acceptation, but ordained him to take a dative, and administer by it.

I think it would, in the same very manner, annul the nomination of the tutory-testamentar, if the parties *sine quibus non* did repudiate and refuse to accept. *Quær.* whether a judicial disclamation be necessary, seeing without that they may repent and accept: though it be the opinion of some that they are limited within year and day. *Vol. I. Page* 91.

1680. *February 27.* JOHN M'LURG, JAMES CLELAND, and the OTHER CREDITORS of BOYD of PINKILL, competing.

IN the competition between John M'Lurg, James Cleland, and other Creditors of Boyd of Pinkill, for getting up of some money owing to him by Fergusson of Kilkerran; the Lords found, that Pinkill the debtor might give M'Lurg, one of his creditors, an assignation to a debt, and cause intimate it to his debtor, and all the while keep it in his own hand and custody: and if it be delivered after other creditors' arrestments of that sum, the receiver shall be preferred to these arresters, though the receiver upon oath hath confessed that the same was not delivered to him by the common debtor till long after the arrestments. Which seems to lay down a ground for permitting debtors to gratify one creditor before another, and so of defrauding of the rest. *Vol. I. Page* 91.

During this Winter Session there were several questions moved, and decisions whereof I was informed; and, not knowing their certain date, I have drawn them all together here, to the number of 51 :—

I.—Anent Inhibitions on Dependances.

Where an inhibition is served upon a depending process, and the defender gets a protestation for not insisting, and thereafter the pursuer cites of new, and insists, and obtains a decreet; it was doubted whether the inhibition reconvalesces and subsists, or if it falls. Some think it depends on the summons, and *illa instantia* being *perempta*, as the summons falls, so consequently the inhibition grounded thereon. Others affirmed, that if the year and day from the date of the summons was not run, though protestation were obtained, yet it might be executed of new, (for there is a *præscriptio annalis in* summonses;) and being once made litigious before the inhibition, would stand, as having the subject matter in controversy *medio tempore* to lean to. *Quær.* if the inhibition will sustain, where the process ends by a transaction, and bond is granted for the debt, which acknowledges the summons was just. If the bond be in corroboration, there is no doubt but the inhibition will stand.

Vol. I. Page 91.

II.—AnentPenalties in Bonds.

If one charge before the term of payment of his debt come, or for more than is due, *viz.* where some of it is paid, or where the suspender hath some other probable reason against it; the Lords use to assoilyie the debtor from the whole penalty: though Calvin, in his Lexicon, *v. Pœna*, says otherwise. See Dury, *22d Feb.* 1639, *Johnston.* But if the bond or security bear more terms of payment than one, the charging for the whole, before the terms be all come, will liberate from a proportional part of the failyie, *viz.* of those terms that are not come, but not of those which were past before the charge.

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III.—Anent Witnesses under Fourteen Years of Age.

Impubes (one within 14 years of age,) cannot be a legal habile judicial witness *in civilibus*, yea not in criminals, except in some very few cases. *Quær.* if he may be used as a *testis chyrographarius* or *instrumentarius*, and if the inserting him, or his subscribing as a witness before he is 14, be a nullity of the writ if there be but one other witness beside. Upon this the family of the lawyers is divided; but the Roman law is clear that he cannot. See Mack. Crim. p. 531, and *Cavalcan. de Testibus.* *Vol. I. Page* 92.

IV.—Anent the Proper Place for Denunciations.

Where a debtor denounced has lands lying within a regality, *quær.* if a denunciation at the head market-cross of the sheriffdom will make his life-rent-escheat of these lands fall, or if he must also be denounced at the regality market-cross. Sir J. Cunningham resolved it thus: Either there is a known place appropriated by custom for denunciations and other executions within the regality, or not. *2do*, The party denounced either dwells within the regality or not. If there be a known place, and he dwell within the said regality

then he must be denounced there, to the effect of the making his escheat thereof fall; but, if he dwell not within the regality, a denunciation either at the market-cross where the lands lie, or where the party lives, will make his escheat to fall; because the Acts of Parliament take notice of his residence where he lives. And though some make a distinction between the single and the liferent escheat, that a denunciation at the market-cross where he dwells should only make his single escheat fall, *quia mobilia sequuntur personam*, yet there seems to be no disparity. And in George Cockburn and my Lord Sinclair's case, the Lords found the denunciation at the market-cross of Edinburgh sufficient to make the escheat of his lands in Fife fall; because it was proven he had been 42 days in Edinburgh before the denunciation, which they found enough to give a domicile. See Mack. Observes on the Act 1621, p. 130. This seemed very scrimp; for law should consider if he be there *animo remanendi*, and have *focum et larem;* or if he be only come to Edinburgh to follow his affairs at law, or otherwise for a time. See *Feb.* 1676, *the Marquis of Athol, supra*, page 59. *Vol. I. Page 92.*

V.—Anent a Son's Liability for his Father's Debts.

A man dies: his nearest in blood, who would have right to his moveables as executor, likewise dies, without either intromitting or being executor confirmed; his son establishes a legal title in his person, and, passing by his father, confirms executor to the first. *Quær.* if this will make him liable for his father's debts, because the *jus sanguinis* is conveyed, transmitted, and devolved to him, by his father, as the channel, and without that he could have no right; and since *ex ejus persona reportat commodum*, he ought also to pay his debts. *L.* 10 and 149 *D. de Reg. Jur.* This hath difficulty with it. *Vide supra, 9th Jan.* 1679, a case similar to this, if the using the father's minority be a *gestio*. *Vol. I. Page 92.*

VI.—Anent Caution for Presenting a Debtor.

One is cautioner for presenting a debtor to prison, and is pursued for payment of his bond, for not presenting him; any exception of payment, &c. which is competent to the principal may likewise be proponed by the cautioner. But *quær.* if the principal debtor (whom he ought to have sisted,) must be called to this process. I think not. See *Jan.* 1678, *Cleland.* *Vol. I. Page 92.*

VII.—Anent the Glebes of Ministers *sine cura*.

The fishers upon the river of Don being profaners of the Lord's Day, there is a chapel of ease erected for them without the city of Aberdeen, whereto there is a stipend mortified for a catechist to catechise them and preach, but not to administer the sacraments. *Quær.* if the glebe of this minister be free of payment of teinds by the 162d Act, Parl. 1693. Some thought not, because he was a minister *sine curâ*, and his glebe was not publicly authorised by the law; especially if it be a church-man that acclaims the teinds thereof. *Vol. I. Page 92.*

VIII.—Anent the Triennial Prescription.

If an account of goods be pursued for after three years, it must be libelled not only that they were delivered, but also that they were resting owing unpaid, and prove the libel *scripto vel juramento*. But, if he pursue within the three years, he needs prove nothing but the delivery and furnishing, and that *prout de jure*, and the defender must offer to prove payment. *Aliud obtinet* in Taverners; see *Ewart's* case *4th June* 1680, and *13th Feb.* 1680, *Master of Salton*. The French law allows process for no more but three years' salary, presuming all precedings to be paid. *Joan. Imbert. Instit. Forens. lib.* 1. *c.* 34.

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IX.—Anent the Import of the Words *Full Debtor*.

It was questioned whether thir words in a bond,—Such a man becomes cautioner and full debtor for another,—import an obligation for the whole debt, where it wants the words *conjunctly and severally*. Some think he is only bound in the half of the sum. But these words, *full debtor*, seem to contradict this. The most rational import of these words is, that he shall have *beneficium ordinis*, and not be liable till the principal debtor be first discussed.

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X.—Annent Requisition of Sums Heritably Secured.

One is infeft in an annualrent bearing a requisition upon sixty days: the creditor requires his money from the debtor upon the foresaid space, and thereafter takes his annualrent from the debtor, which (if for terms subsequent,) is reputed in law a tacit passing from his requisition: thereafter he charges summarily with horning. This charge is quarrelled as null, because he ought to have required of new ere he had charged, the former requisition having been passed from by the taking of annualrent, which annualrent is payable by virtue of the heritable clause; and so he had recurred back to the heritable right, though it was once loosed and made moveable by the requisition and charge. Others thought this made it only moveable so as to fall to his executors, and not to his heir; but did not alter the case *quoad debitorem*. See Hope's Min. Pract. c. 2.

It were fit to insert a clause in such rights, that the requisition and charge shall not prejudge nor loose the heritable right, and that they may charge for the money on six days. See *March* 1671, *f.* 94.

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XI.—Anent the Effect of Premonition.

The Lords have found, though requisition doth loose a wadset, and make the heritable sum moveable, yet premonition does not, because it was no deed of the creditor's, unless an order of redemption had followed on the premonition, and a consignation had been used; for by that the wadset money became likewise moveable.

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XII.—Ruthven of Dunglass' Creditors competing.

In the competition of the creditors of Ruthven of Dunglass, the Lords found, where a comprising doth not proceed upon an heritable bond, but only upon a moveable debt or a decreet, a charge of horning needs not of necessity precede the denunciation of the lands to be apprised, if it be the party's own debt whose lands are denounced; but if it be his predecessor's debt, then he must be charged to enter heir to him. But whether it be his own debt or not, if he lie out of lands to which he may succeed, yet he must (though it be his own debt) be charged to enter heir, before these lands can be apprised from him. *Vol. I. Page* 93.

XIII.—Anent Oaths of Calumny in Improbations.

In a reduction and improbation it was alleged, I cannot take a term to produce, because I crave the pursuer's oath of calumny if he hath reason to think the writ called for is false and feigned; and if he will not give his oath of calumny, I am not obliged to produce the principal, whatever nullities may be in the writ or decreet.

I think this is debateable, and the greatest effect it can have is, that the defender shall take a day to satisfy the production in the reduction, by producing an extract, and not the principal, which he behoved to do if the improbation was sustained. But the pursuer, if he can make any advantage by it, may produce the principal. However, it may be objected, that an oath *de calumnia* is only a complex oath *super toto libello*, and not upon every member and article of it. *Vide* Dury, *29th June* 1626, *Lord Kildrummy.* *Vol. I. Page* 93.

XIV.—Anent Provisions in Contracts of Marriage.

Where a wife, in a contract of marriage or other writ, is provided to a half or third of the moveables or household furniture existing the time of her husband's decease, the husband's moveable debts will be deduced in the first place, and exhaust the moveable estate *pro tanto*, and she will only get her half or third proportion of what remains behind free, *deducto ære alieno mobili;* unless the clause be conceived thus, That a third or other proportion be assigned or disponed to her, *per verba de præsenti;* or *2do*, That it be declared that it shall be a free third, and noways to be affected with the moveable heirship, or the husband's debts; for this will make the wife a preferable creditor thereon. *Vol. I. Page* 93.

XV.—Doctor Borthwick *against* John Burn of Midlemiln.

In 1677, in a case betwixt Doctor Borthwick and John Burn of Midlemiln, a comprising being annulled for wrong registration of the bonds *extra territorium* where the debtor lived, the Lords would not so much as sustain the comprising *quoad* the necessary debursed expenses, but assoilyied from all expenses whatsoever, and restricted it to principal and annualrents allenarly. *Vide supra*, *18th Jan.* 1680, *Orrock.* *Vol. I. Page* 93.

XVI.—Anent the Act 62d, 1661.

Though the Lords have extended the 62d Act of Parliament 1661, anent the heirs of debtors acquiring apprisings upon their predecessors' estate, and declaring them to be redeemable; yet that hath not hindered them from making such fraudulent purchases. For, 1*mo*, though the act mentions only acquisitions in time coming, yet the Lords have extended it to such deeds as were prior to the act. 2*do*, It declares the same shall be redeemable by creditors having a real right; yet the Lords have allowed personal creditors this favour; yea they have sustained a summons of declarator, at his instance, against an appriser, to stop his legal from expiring, in these terms, That he is paid of his sums within the legal by intromission, and what he wants he will pay him at the bar: which they sustain to this purpose, that the lands may be open and affectable by the personal creditors following diligence: which the Lords admit, where the legal is near expiring and the personal creditor can shortly thereafter establish a real right in his person by apprising or adjudication. See February 1676, *supra*, No. 464, page 59, *anent apprisings*. This is done *in odium* of apprisings; for the which cause the Lords now, upon the least informality, loose apprisings, and restrict them to principal and annualrents: but this laxness may be dangerous; for many estates in Scotland are only possessed by apprisings. 3*tio*, Though the apparent heir have only a naked disposition to the said apprising, and no infeftment, yet the Lords find the terms and meaning of the foresaid Act of Parliament to reach him, and that he should prove what he gave for the said right, and his intromission within the ten years after the acquisition must be allowed in the first end of the price he gave. See the case if he got it *gratis*, 25th Feb. 1679.

But the exuberant trusts they put in other persons' names evacuated much of the design of this Act of Parliament; for they cause them dance through many hands, to involve and intricate the conveyance. *Vide* 11*th July* 1671, *Kirkonnel*; 14*th July* 1681, *Gordonstown*. *Vol. I. Page* 98.

XVII.—The Town of Edinburgh *against* The Earl of Marishall.

In the Town of Edinburgh's pursuit against the Earl of Marishall, it fell to be argued, if his exercing the *officium Mariscallatus* be a *gestio pro hærede*; it being more than his assuming the title of an Earl, or his place in Parliament, because he hath special obventions and emoluments by it. *Vol. I. Page* 94.

XVIII.—Anent the Passive Title of Uplifting Maills.

Where one is pursued on the passive title of uplifting the maills and duties of a father's lands, and this is referred to his oath, and he suffers the term to be circumduced, and decreet is extracted against him; this being objected against him as *probatio probata* of the said passive title, and though voluntary payment be not a passive title, yet payment by virtue of a sentence is:—the apparent heir alleges, though he intromitted, yet it was by virtue of a singular title, such as a disposition, gift of escheat, or the like, and so it was not a

gestion. ANSWERED,—This was competent and omitted in that former decreet obtained against him as intromitter, and so not receivable now.

REPLIED,—That was *res inter alios acta, et aliis non prodest*; and also cannot prejudge him here: and he was only holden as confessed.

I hear that the Lords, in the case of *Sir Robert Crighton*, as assignee by one Ker, and *Murray of Broughton*, found that Broughton behoved to purge his contumacy why he compeared not to depone; and he offered to prove he was then in Ireland. But here there was some jealousy against Broughton's purchase and right. I think a decreet upon a circumduction is no probation in favours of other creditors; but if the apparent heir's intromission be proven by witnesses, and there be a decreet thereon, it is thought that probation will be enough to make him liable to all the other creditors. See Stair, *tit. Behaving as Heir*, where he limits this by reponing the heir to his defences against others. *Vide* anent Broughton's case, *9th Nov.* 1682. *Vol. I. Page* 94.

XIX.—ANENT A PRESUMPTION of USURY.

WHERE a bond or right is dated about Candlemas, and yet, notwithstanding thereof, appoints the sum to bear annualrent from the Martinmas preceding, this is no sufficient presumption of itself to make the contract or bond usurary, (though it is to be shunned;) for the money might be ready at the Martinmas, and the security prolonged and delayed upon the absence of some of the subscribers. *Vol. I. Page* 94.

XX.—BURNET, Tutor of Leys, *against* A QUAKER.

IN the case of Burnet, tutor of Leys, the Lords found, that a Quaker should not be holden as confessed for refusing to swear; but allowed them to declare the truth in their own terms, *viz.* as in the presence of God. See *July* 1676, No. 257. No. 492, § 1, page 92. *Vol. I. Page* 94.

XXI.—WILLIAM STEVENSON *against* THOMAS ALLAN.

IN a case between William Stevenson, bailie in Edinburgh, and Mr Thomas Allan, minister; the Lords ordained this point to be heard in their own presence, If a minor in his testament might nominate his own curator to be his universal legatar; that being *mali exempli*, and presumed to be impretrated by himself. The civil law hath provided against this. *Vide* 10*th December* 1679, *Gairden*. *Vol. I. Page* 94.

XXII.—ANENT SUCCESSION to an UNKENNED TERCER.

A WOMAN having right to a terce, dies without being served or kenned to it: her second husband, or her nearest of kin, confirm themselves executors as to the maills and duties of these terce-lands, and pursue the intromitters.

It was ALLEGED, for them, That, though she had a right in her person, yet she never exercised the faculty; and so it was *jus personale, quod radicatur in ossibus, et non est transmissibile ad hæredes*, she dying without establishing a formal right thereto by a service.

Yet I think the right of it transmits to her representatives; though, it may be said, if she had been pursuing herself, it would have excluded her, that she was not served to the said terce. *Vol. I. Page 94.*

XXIII.—Anent the King's Advocate's Servant's Dues.

The King's advocate's servant craving ten merks when improbation was proponed *incidenter* by way of exception, it was the general opinion of all the formalists about the Session, that it was a novelty, and that there was no such thing due, but only where there was a signeted summons of improbation. *Vol. I. Page 94.*

XXIV.—Anent Relief in Cases of Partial Loss at Sea.

In a pursuit, at the instance of some owners whose goods were lost, against the rest whose goods were saved, the Lords found they behoved to say, the goods of the rest were saved by the pirates or capers plundering of theirs. But it was offered to be proven, that a storm came on afterwards, by which all their goods would have perished if they had not run into land. *Vol. I. Page 94.*

XXV.—Anent Lands within Burgh but not Burgage.

Quær. where lands lie within a burgh royal, but not holding burgage, being either temple lands, or belonging to some chaplainry, prebendary, &c. if the magistrates may stent them as well as other lands. Much depends upon custom; and I think they may cause them bear burden with the rest. *Vol. I. Page 94.*

XXVI.—Sir Robert Sinclair *against* ——————.

In Sir Robert Sinclair's case and several others, the Lords found that intromission with victual maills and duties of land, though extending to £40,000, was probable by witnesses, and *prout de jure*, though it was to extinguish an infeftment of annualrent constituted by writ: but, if it be the intromission with the money rent of lands, then within £100 Scots, it may be proven by witnesses, and above that sum only *scripto vel juramento;* and thus, in January last, the Lord Castlehill decided in the suspension at *Mr Hugh Peebles'* instance against *M'Gill.* See *13th Feb.* 1671, *Wisheart.* *Vol. I. Page 94.*

XXVII.— ——— *against* The Magistrates of Lanerk.

In a pursuit against the Magistrates of Lanerk, for suffering a rebel to escape; those who were in office for the time are liable, though there be others who have succeeded in their office since, for they are convened *vel ex vero vel ex quasi delicto.* As also, I may convene the actual Magistrates, though it was not done in their time; neither need I say they are Magistrates elected, seeing I offered to prove he acted and exerced the office, and was *tentus, habitus, et reputatus;* for they who were elected refused, because of the declaration, and he having

been bailie the preceding year, continued to exerce for this also. See Dury, 11*th November* 1684, *Bower*. *Vol. I. Page* 95.

XXVIII.—Anent Gifts of Offices before Vacancy.

Sir William Ker being very sick in January last 1680, Scot of Ardrose presented his signature, as Director of the Chancery after his decease: the Exchequer, in respect of Sir William's recovery, delayed to pass it. But Sir George Lockhart thought his gift, in case of a competition of another granted by the King after Sir William's death, would be found null, because it did not bear the way of vacation in the King's hands; and, in the gift and disposal of all offices, they ought to bear *verum modum vacandi*. See Anton. Faber *ad tit. C. de S. Sanct. Eccles.*; and they ought truly to be vacant ere they be gifted, as the 23d Act, Parl. 1567, provides, in the case of gifts of escheat: but, if the King shall give no other patent of it, nor make another donatar, then Ardrose's gift will stand good. *Vide Ludov. Gomez ad Regul. Cancellar. Apostol. de impetrantibus Beneficia Viventium*; which is prohibited. *Vol. I. Page* 95.

XXIX.—Anent the Escheat of Uncompleted Apprisings.

A tack assigned falls under the single escheat of the assignee; but, *quær.* where one assigns a comprising whereon no infeftment had followed, whether that apprising will fall under the assignee's escheat, or if it will fall under the escheat of the apparent heir of the appriser. See Stair, as to the effect of assignations. *Vol. I. Page* 95.

XXXI.—Anent Charters by Superiors to Apprisers.

Charters granted by a superior to apprisers in obedience to a charge, and not bearing a *novodamus*, yea a precept of *clare constat* from a superior, does not import a discharge of non-entry and preceding casualties of the superiority; but, as soon as infeftment is taken thereon, it liberates for the future from non-entry and the other casualties during that vassal's lifetime. A superior or overlord may redeem a comprising; *quær.* if he may redeem a wadset or other voluntary infeftment, *a paritate rationis et vigore statuti, viz.* Act 36, James III. But, that being a correctory statute, *non trahitur ad pares vel similes casus.* *Vol. I. Page* 95.

XXXII.—John Philip, Minister of Queens-ferry, *against* His Parishioners.

In January 1680, Mr John Philip, minister at the Queen's-ferry, having only 400 merks of yearly stipend, pursues his Parishioners for an augmentation, before the Commission for Plantation of Kirks; who refused the same, in respect he already possessed all the free teinds of the parish; and, *intuitu* that he had a considerable fortune of his own, he was put into that lean benefice: and they found that the stock ought not to be burdened with ministers' stipends where there is not sufficiency of teinds; and that the stipend ought not to be modified *ex quolibet subjecto*, but only out of teinds. But sometimes, where there is not sufficiency of teinds in that parish, they may go to the next, as was done betwixt

the minister of the church at North-Leith, and at St Cuthbert's, or the West-kirk. *Vol. I. Page* 95.

XXXIII.—Lord Halton *against* The Town of Dundee.

Mr William Rait, second minister of Dundee, being dead; the Town, who had presented three or four ministers since the Reformation, gives a presentation to ———. My Lord Halton, as constable, having the presentation of the parson, claims right to present all the ministers in the Town, and prevails so far with the bishops, (who are too much subservient to the state,) to refuse to ordain him whom the Town had presented, (for they use not collation there, because he gets only an Act of the Town-Council for his warrant and his stipend;) and they dare not deny my Lord Halton's desire.

The point of law is the same with that of the Earl of Haddington and the Town of Haddington. The canon law was shown to the Archbishop of St Andrew's, and to Haliburton, Bishop of Brechin, *viz. Capitul.* 7, *extra, de Jure Patronat.* where it is ordained, that they who presented last to the benefice should continue in possession till the point of right were decided. But the bishops were timorous and unwilling to disoblige great men, and so refused ordination; yea, the Bishop of St Andrew's hath so far deceived them and yielded to Halton, that he, contrary to promise, hath collated one Irvine presented by him; which will not so easily be got reduced *pro hac vice*, though they gain the declarator. *Vol. I. Page* 95.

XXXIV.—Anent Pursuits by a Wife.

A wife pursues for a debt with concourse of her husband: a horning is produced to debar the husband: *quær.* if this should sist the wife's process, the husband being only pursuer *pro interesse;* especially if it be produced after litiscontestation. Some think it should not. *Quær.* if a horning against a tutor would in law debar a minor *ab agendo*, as not being fully authorized.

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XXXV.—Anent Donatars to Escheats.

A donatar is liable for the debt of the horning whereupon his gift proceeds: *quær.* what if he hath not intromitted with as much of the escheat goods as will pay the said debt, or if he hath not done diligence; if he may be reached, as he who ought and should have intromitted, at least *in quantum* will pay that debt. *2do*, If the debt bear no annualrent *nec pacto nec lege*, but only after the denunciation, whether the donatar will be liable for the accessories of the said debt, *viz.* the annualrent that falls due after the denunciation; or *esto* the annualrent were only due by the custom of merchants. *Vol. I. Page* 96.

XXXVI.—Anent Advocates Acting without Mandates.

An advocate compears for a defender in a decreet, and the decreet is afterwards annulled, because the defenders disclaim the employment or mandate; whereby the pursuer is put to great loss and prejudice: whether or not will he

have action of damage against these advocates for their officious compearance? This is to touch advocates in their copyhold.—If witnesses refuse to compear, the English law gives action of damage against them for his loss through their not deponing.—The remedy for this would be, for advocates to have written mandates to warrant their compearance: and this was so ordained by an old Act of Sederunt, *in anno* 15—, and is no disparagement; and in disclamations, and in some other special cases, they are yet required; and it would help many inconveniences. *Vol. I. Page* 96.

XXXVII.—Anent Poinding.

A poinding is quarrelled, because the apprising of the goods is a month after the poinding. This seems not to be a nullity, there being no time prescribed in law; and the debtor hath an advantage by the delay, *viz.* the benefit of redeeming *medio tempore*, aye till they be carried to the market-cross, and there rouped and apprised. Some say he hath also *jus luendi pignoris* for twenty-four hours thereafter. See *Feb.* 1676, [No. 465, § 2, page 61.]

Quær. Where the heritor of a mill convenes another man's tenants for abstracted multures, if he ought not likewise to call their master to the said pursuit. *Vol. I. Page* 96.

XXXVIII.—Anent Superintromission with Executry.

Where one pursues an executor, and he defends upon exhausting, and it is replied, that they must still be liable because of superintromission above the inventary confirmed; if this be urged as an universal passive title to make them liable for the whole, it will be repelled, unless they have a title as executor-dative *ad omissa*; but if they can qualify evident fraud and dole, that they know of the omitted goods and concealed them, the Lords will in that case sometimes admit it by way of reply, without putting them to take a dative, *28th Jan.* 1678, *Andersons.*

But if the pursuer declares he propones the superintromission, not *ad hunc effectum* to infer an universal passive title to be liable for the whole, but *in quantum* they have intromitted with, conform to the value, this reply of superintromission will be sustained without the necessity of taking a dative *ad omissa.* This is denied by others; *vide supra, p.* 1. *Cockburn.*

If the superintromission was before confirmation, then it is receivable *hoc loco* summarily; but if it be after the confirmation with goods not confirmed, then it is not admitted without a dative. *Vol. I. Page* 96.

XXXIX.—Anent Presentations to Kirks, by Females.

An heretrix of lands to which lands there belongs a patronage of a kirk, may present a minister, though it be of its own nature *actus virilis.* But *quær.* if a liferentrix of lands having a patronage therein, may present. I think, if she be infeft as a conjunct fiar, she may. See *Vinn. ad pr. Tit. Instit. de Usufr.* and Craig, *p.* 264, &c. in the case of a donatar to a ward. *Abbas Sicul. Panormitanus,* in three several places, *ad tit. extra, in Decretalibus de Jure Patronat.*

affirms a woman may present. See Basnage on the reformed Norman customs, *p.* 69, where a liferentrix *(une douarriére,)* may present. *Vol. I. Page* 96.

XL.—Anent the Prescription of Bonds.

A bond is alleged to be prescribed. Answered,—An inhibition was raised thereon within the forty years, though it was never registrate; for it is an execution in its own kind, though it infers not present payment; and *quævis insinuatio pro interruptione habetur.* See *July* 1671, *Mackraw.*

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XLI.—Anent Relief among Co-cautioners.

There is a bond, wherein, with the principal, there are five cautioners bound; one of whom paying the debt, he gets assignation to the bond against the principal and two of the cautioners, (for they were obliged to relieve one another *pro rata;* and though that clause were not expressed, yet *inest de jure;*) but he discharges the other cautioners, and declares he shall use no execution against them; and then he pursues one of the two cautioners for the sum, who excepts, and alleges, I cannot be bound to pay neither your fifth part, nor the two parts of the two cautioners whom you have discharged; as for the two fifth parts remaining, I can only pay my own fifth part of the whole sum; and further, a fourth part of the other fifth cautioner his part, because he being *lapsus bonis,* his fifth part divides in four parts, to be equally paid by the other four remaining cautioners. *Quær.* if the co-cautioner will be liable for the whole fifth part of him that is insolvent, or only for a fourth part of it.

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XLII.—Anent a Possessory Judgment.

In a removing, the defence of a possessory judgment, *viz.* I have been seven years in possession by virtue of a right and title, (though never so defective,) defends, and they must reduce it.—It was formerly thought, that the same defence of a judgment possessory would be sustained in an action for maills and duties; but now of late the Lords begin to alter, and in such actions ordain them to debate the preferableness and validity of their rights, notwithstanding of their septennial possession. *Vide supra, 30th July* 1679, *Boog.*

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XLIII.—Anent Objections to the Warrants of Decreet.

In the transferring of a decreet it was alleged, that the defender in that decreet was only holden as confessed, and he had craved to be reponed.

Answered,—The contumacy cannot be purged now, because he is dead.

Then they offered to improve the executions of the summons by which he was cited as false; as also the grounds and warrants of the decreet, *viz.* the signatures of process, acts of litiscontestation, &c.

ANSWERED,—The decreet is dated in 1649, thirty years ago, and the registers of that year are lost; and therefore the pursuer and user of the decreet cannot be obliged to produce small executions. The Lords found the pursuer could not be holden to produce the principal executions and minutes of process now, *post tanti temporis intervallum. Quær.* if the clerk of the Court where this decreet was given was called here, or not. *Vol. I. Page 97.*

XLIV.—ANENT the PUBLICATION, &c. of INHIBITIONS.

A PERSON who is inhibited dwells in one shire, and hath his lands lying in another. The inhibition is only published at the market-cross, and registrate in the Court books of the shire where the party dwells; but is not published at the market-cross, nor registrate in the books of the shire or regality where the lands lie. This is certainly a nullity, as being contrary to the 118th Act, Parl. 1581. It is true, it may serve as a diligence in the sense of the 18th Act, Parl. 1681, against bankrupts, to reduce posterior gratuitous deeds; but will go no farther. *Vol. I. Page 97.*

XLV.—ANENT COMPENSATION and QUALIFIED OATHS.

I ARREST in the hands of my debtor's debtor; he depones he is owing, but produces a bond by which my debtor is owing him as much, only the term of payment in it is not yet come, and it hath some other qualities. *Quær.* if this be such a liquid compensation as that it *ipso jure* extinguishes the debt, or if he may be decerned to make forthcoming notwithstanding thereof.

One was cautioner in a bond; the bond is lost; the debt is referred to the cautioner's oath; he depones *qualificatè* that he was indeed cautioner for such a person, but he knows not but the same may be paid, and the bond retired by the principal, since it is not produced; and that he is frustrate of his relief, since his oath will not prove against the principal debtor. *Quær.* if this quality will assoilyie him, at least if it will procure him relief against the principal for whom he was bound; or if the Lords will decern for his relief.

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XLVI.—ANENT RIGHTS containing no MENTION of HEIRS, &c.

A BOND is granted, payable only to a man himself, without mentioning his heirs, executors, or assignees. The creditor dies before the term of payment. *Quær.* if it will transmit to his executors. I think it will; for *dies cessit sed non venit.* Though some object that *dies adjectus* is like a condition; and if it do not exist, then the conditional debt ceases; and the bond might be granted for personal considerations to the man himself only. Yet it was decided, where a man gives a bond of provision to his daughter, payable at her age of fourteen years, if she die before that age it doth not pass or transmit to her heirs or executors. See *23d Feb.* 1671, *Viscount of Oxford,* where the day was found to be adjected *differendæ obligationis gratia,* and not merely *differendæ solutionis causa.*

Where a man only infefts himself, without mention of his heirs or assignees, or (as Stewart of Shambelly did,) takes it only to himself and to the heirs-male

of his body; if he die without sons, though he have daughters, or brothers and sisters, yet it will belong to the king as *ultimus hæres*. On which ground Halton got the Earl of Dundee's estate, though the Earl had a sister.

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XLVII.—Sir John Dalrymple *against* Drummond of Carlowrie.

Sir John Dalrymple, advocate, pursues Drummond of Carlowrie upon a tack of teinds, set by the Archbishop of St Andrew's to the Laird of Newliston, his lady's grandfather. Alleged,—the tack bears, it shall belong to him and his heirs, they always being entered heirs and infeft; which Sir John's lady is not. Replied,—She is infeft upon an adjudication, which is equivalent. Duplied,—The Archbishop in that clause hath not intended to gratify singular successors; but had an eye to the honour of the family, that they might only bruik as heirs by service.

The Commissaries, before whom this pursuit was, sustained her entry by adjudication as equipollent. *Dubitatur an recte.* See this decided *infra*, 16*th Nov.* 1680. *Vol. I. Page 97.*

XLVIII.—Anent the Park of Holyrood-House.

Duke Hamilton, as keeper of the palace of Holyrood-house, was, by letters from his Majesty, ordered at several times to furnish rooms, lodgings, and apartments there, to the Marquis of Athol, Halton, &c. Sir James Hamilton hath no more but the heritable keeping of the park of Holyrood-house from the king, (which the Earl of Haddington hath now adjudged from him. *Quær.* if this be transmissible voluntarily to assignees, or judicially to creditors. For one who apprises the Earl of Errol's lands and offices, will not thereby be constable of Scotland, or Earl of Errol.) *Quær.* if the king, *ex eadem paritate rationis*, may not grant precepts, appointing the keeper of his park to take in 100 horses, sheep, or cows for Halton, or any others, to be grazed there *gratis*, and so evacuate the keeper's benefit. *Vol. I. Page 98.*

XLIX.—Anent Conjunct Persons.

The Lords are now constantly in use to force conjunct persons, as brother and brother-in-law, uncle and nephew, to astruct the onerous cause of their debts otherwise than by the assertion of the bond itself, or of their own oath; and though the 18th Act, Parl. 1621, does not mention bonds, yet the Lords, *a paritate rationis*, extend it to bonds; as lately in the case of the Laird of Renton against Lamerton; and in July 1674, in Mr Patrick Couper's case against Blair of Klnfauns, who was only uncle to the common debtor; and so was it decided of old, Durie, 23*d March* 1674, *Duff*; 29*th Jan.* 1629, *Auld*; 9*th March* 1639, *Riddoch*. But if the assignee be an extraneous person, then his own oath is taken on the onerous cause; Dury, 22*d June* 1642, *Nisbet*. *Vide supra*, 6*th Dec.* 1679; 24*th Jan.* 1680, *Ker*. *Vol. I. Page 98.*

L.—Anent the Brocard, *Falsum in Data*, &c.

Falsum in datâ falsum in omnibus, (as Craig hath it, *p.* 156,) is a brocard

which holds only in case there be a competition between rights and diligences, where they are preferred according to their dates; or where a writ is antedated to evite the reason of reduction *super lecto ægritudinis*, and the like.
Vol. I. Page 98.

LI.—Anent the Executors of Liferenters.

That liferenters and their executors may have right to the half year preceding Whitsunday or Martinmas, it is required that they live till these termdays. But it is not well agreed upon, whether they must outlive twelve o'clock of that day, or two o'clock in the afternoon, or twelve o'clock at night after Whitsunday or Martinmas. For ministers' stipends, the terms are Whitsunday and Michaelmas, by 13th Act, Parl. 1672. *Vide* 31st July 1679; and Stair, *tit.* 30, § 54, where he shows that it was interpreted Martinmas day in the afternoon.
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1680. *June* 4. Home of Wedderburn *against* George Park of Foulfuirdleys.

George Park of Foulfuirdleys holds his lands feu of Home of Wedderburn, under this irritant clause, that, *sub pœna amissionis feudi*, he shall ride and wait upon his superior whenever he shall be required to attend him; and this clause is in the charters of the most part of Wedderburn's vassals. And, upon a debate betwixt him and them in 1638, the Lords found, if Wedderburn called them to attend him in his own private concerns, then it was upon his charges; but if it was on any public concern of the kingdom, then their attendance in that case behoved to be upon their own proper expenses; yea it bore, when he was bound to entertain them, he might set them down at the table, and give them meat with his servants; though Home of Ninewalls, and some other good gentlemen, hold of him by this tenor. It may be doubted if they may perform these servile parts by a substitute; but it is certain, where they find the terms dishonourable, *licet iis refutare feudum*, and abandon it to the superior.

In June 1679, when the heritors were called to the West against the rebels, Wedderburn required Foulfuirdleys and other vassals to attend him, conform to the *reddendo* of their charters; Foulfuirdleys went indeed to the host with the heritors, but did not attend his superior; whereupon he convenes him in his own baron court, (for by their rights they are liable to answer to his head courts if cited, and *curia domini et pares curiæ* are most competent, especially to judge on feudal prestations and services;) and fined him in 100 pounds Scots. Foulfuirdleys suspends, 1*mo*, That he was not lawfully cited, being only cited on the ground of the lands, and he dwelt *alibi*. 2*do*, He had lands holden of the king; and so, being called forth by his proclamation, he was obliged *obedire domino antiquiori* in a competition; as is decided in all other casualties.

Answered, to the 1*st*,—The superior was bound to know no other dwelling but the land he had given him; likewise he had labouring there, in his own hands, and so it might soon come to his knowledge. To the 2*d*,—The king's command and Wedderburn's were *ad idem*, and it detracted nothing from the

king's service that the suspender rode in his superior's company and retinue; and he ought not to be permitted to contemn his superior.

This debate being reported, the Lords found he was obliged to have attended his superior, and that in doing of it he likewise attended the king; and there was no interfering or incompatibility of duty or commands, but both tended *ad eundem finem et effectum*; therefore they repelled the reasons of suspension: but they retrenched and modified the fine to 50 pounds Scots. *Vol. I. Page* 100.

1680. *June* 4. HOPE of CRAIGHALL *against* ERSKINE of OTTERSTONE.

HOPE of Craighall pursues Erskine of Otterstone, his vassal, for non-entry. ALLEGED,—Absolvitor, because he is infeft on a precept of *clare constat*. REPLIED,—The precept is null, for his act of curatory appoints three to be a quorum; and it is only subscribed by one of them, *viz.* Mr Archibald Hope. DUPLIED,—That is *nullitas facti*, and so only receivable in a reduction. *2do*, Offers to prove, by production of seven or eight several evidents, that Mr Archibald acted as sole curator; which is sufficient warrant to assoilyie him from an odious non-entry.—This seemed relevant, but it was elided by this TRIPLY,—They offered to prove that the precept was never delivered to him, but *viis et modis* unwarrantably got up from one in whose hands it was conditionally consigned, and that without performance of the condition. This triply was sustained. *Vol. I. Page* 100.

1680. *June* 10.

ONE pursues an executor for a debt, and refers it to his oath, that the defunct to whom he is confirmed, acknowledged it as a true debt upon his deathbed. ANSWERED,—*Non relevat* unless the executor had then, or since, promised to pay it. REPLIED,—It being within 100 pounds Scots, it ought at least to have the force of a verbal and nuncupative legacy: DUPLIED,—Verbal legacies are not sustained in our law where there is a written testament; because then it is presumed that *testator totam suam voluntatem in scriptis redegit*, and that he intended not *partim testatus et partim intestatus decedere*. But these nuncupative legacies were only effectual where they were left by one who made no written will and testament.

The Lords, before answer, ordained the executrix to depone; and so waved to decide the relevancy. *Vol. I. Page* 101.

1677 *and* 1680. PATRICK REID *against* SIR JAMES STEWART.

1677. *June* 7.—THIS day the Lords advised Mr Patrick Reid's process against Sir James Stewart; wherein they found,—by the unsubscribed scrolls of account given in by Andrew Balfour, where the balance was only £47

Scots to Sir James, though the accounts were yet open, unfitted, and all counts bear tacitly *salvo justo calculo;* (but here it was not *error in calculo*, but in placing and charging himself with articles;) and Balfour's letters to Cutler acknowledging the balance of accounts between Sir James Stewart and him were near equal;—that Sir James was not Balfour's debtor in the L.200 sterling acclaimed, but that the two, conjoined, amounted to a discharge; only ordained Sir James to depone anent the instructions of the debit side of the account, &c.

See it fully in the informations beside me. *Advocates' MS. No.* 591, *folio* 291.

1680. *June* 15.—Mr Patrick Reid's action against Sir James Stewart was decided, and Sir James assoilyied. See *7th July* 1677. *Vol. I, Page* 102.

1680. *June* 15. JOHN CLERK *against* MUIRHEAD and OTHERS.

Two decreets obtained by John Clerk against Muirhead and others, are turned into a libel, because Mr William Monypenny, advocate, disclaimed his compearance, though he was marked, taking a day to produce them: only the persons reponed were decerned to pay the expenses of the decreets.

Vol. I. Page 102.

1679 *and* 1680. The LADY SHEINS *against* the LADY WAMPHREY.

1679. *January* 2.—IN the action betwixt the Lady Sheins and the Lady Wamphrey, the Lords would not bring in Sheins' diligence as done *pari passu* and within year and day with Wamphrey's, albeit it was alleged that Wamphrey retarded Sheins by suspending; seeing they had time enough to have discussed the cause within the year, but were *in mora*, and suffered it to lie over. *Vide infra, 26th Jan.* 1681, *Lady Bangour.* *Vol. I. Page* 30.

1680. *June* 15.—IN a case betwixt the Lady Wamphrey and Sheins, (*vide* 2d Jan. 1679,) the Lords admitted a compensation to extinguish a comprising, they proving by the compriser's oath that it was for the debtor's behoof.

Vol. I. Page 102.

1680. *June* 18. COLIN MACKENZIE *against* The TOWN of EDINBURGH.

MR Colin Mackenzie against the Town of Edinburgh for the ann due to Mr Robert Lawrie, who died, one of their ministers. ALLEGED,—The ministers of Edinburgh have never been in possession of an ann past memory of man; and so have prescribed an exemption and immunity. ANSWERED,—They oppone the Act of Parliament 1672, which is general, and excepts none from payment of anns. This was taken to the Lords' answer. But it was thought an ann would be found due. *Vol. I. Page* 102.

1680. *June* 18. JAMES CLELAND *against* DAVID RICHARDSON.

IN James Cleland's improbation against David Richardson; the Lords, upon a bill given in by David, ordain James to give back the decreet of certification extracted by him against David's comprising, the said David paying the expense of the said decreet of certification, and producing the writs called for within twenty-four hours; otherwise ordain the certification to stand in force against him. The reason of reponing him so summarily was, because he instructed, by Adam Christie, under-clerk, that the writs were in his hands lying in another process, whereby David judged himself secure.

Vol. I. Page 103.

1679 *and* 1680. MAGISTRATES of KIRKCUDBRIGHT *against* M'JOR.

1679. *December* 19.—IN a suspension of a charge upon a decreet of the Bailies of Aberdeen, the Lords found the decreet bearing the probation to be the party's judicial confession before them, was not enough, being only the assertion of a notary. (Yet he is a town-clerk;) see *June* 1661, *Osborn*. And the Lords found the debt behoved to be otherwise proven than by a confession only mentioned in the decreet. Yet, in a case betwixt the Magistrates of Kirkcudbright and one M'Jor, (*Vide 27th Jan.* 1682, Carnegie against Cuthbert,) the Lords admitted this to probation, in fortification of the decreet mentioning his confession, that there was a written confession lying as the warrant of the decreet, but *cum onere maximarum expensarum* if there was none, in respect M'Jor was lying in prison for 200 merks, wherein they had fined him for oppressing. But thereafter, on report, the Lords altered this, and turned the decreet into a libel, and reponed him to his oath. *Vol. I. Page* 71.

1680. *June* 22. The Lords of Session renewed the commission to the Town of Kirkcudbright against John Macjor, (19*th Dec.* 1679,) for proving their libel; which they did upon this reason, that it appeared the commissioner chosen by the said John did not attend the former diet assigned for executing thereof.

Vol. I. Page 103.

1680. *June* 23. OGILVIE *against* OGILVIE.

ONE pursues an executor for 500 merks of tocher due by a contract of marriage. ALLEGED,—The contract can only furnish action for L.100 Scots, because it is only subscribed by one notary and three witnesses. REPLIED,—The executor can never quarrel it, because he is one of the subscribing witnesses.

The Lords found this should operate so far as to affect his part of the executry; but it could not prejudge creditors. It is thought a testament with one notary is sufficient, but not a contract of marriage. *Vide* a remark, 24th July

1679. Yet a contract is very favourable where marriage follows; Dury, *4th Dec.* 1629, *Graham.* *Vol. I. Page* 104.

1680. *June* 24. The COMMISSARY of PEEBLES *against* a BAILIE of REGALITY.

THERE was a competition betwixt the Commissary of Peebles and a Bishop's Bailie of a Regality there, which of them was most competent judge to a slander of calling one a thief. ALLEGED for the Bailie of Regality,—That a regality had power of repledgiation from all other courts, whether in matters civil or criminal; and so the *curia Christianitatis* should not have meddled to judge here; especially he being a churchman's bailie, and so as capable to judge on scandal as the Official or Commissary. This went to the Lords' answer; but it was the general opinion, that the Commissary was more competent, especially being an ecclesiastic regality, who do not so properly repledge, but only sit and concur with the other judge. *Vol. I. Page* 104.

1680. *June* 25. AGNES CAMPBELL and ANDREW ANDERSON, her Husband, *against* PATRICK RAMSAY and JOHN REID.

AGNES Campbell, relict of Andrew Anderson, printer to his Majesty, having charged Patrick Ramsay and John Reid, upon their bonds, to return and serve her:

The Lords found, by the agreement betwixt the parties, the suspenders could not set up a printing-house of their own, and fulfil likewise the obligements of the said agreement; unless the suspenders will offer to prove it was so communed and agreed upon, that the suspenders might, notwithstanding of the foresaid obligement, go loose, or set up a printing-house of their own; which the Lords find relevant to be proven by the charger's oath; and that she be examined in presence of any persons the suspenders shall bring thither: but would not take a probation contrary to the written agreement; though by privy councillors, who, on her soliciting them, heard her declare those that were apprentices were free to set up for themselves. *Vol. I. Page* 104.

1680. *June* 25. PATRICK YOUNG *against* The CREDITORS of GAVIN HAMILTON of RAPLOCH.

PATRICK Young, as donatar to the single and liferent escheat of Gavin Hamilton of Raploch, granted to him by the Duke of Hamilton as Lord of the Regality within which Raploch dwells and his lands lie, pursues a special declarator. ALLEGED for Raploch's creditors,—That no more can fall under the Lord of Regality's gift of escheat but only the maills and duties of the lands lying within that regality. REPLIED,—His moveables do likewise fall under

this gift, and not only those lying within the bounds of that regality but wheresoever they lay; and particularly the liferent of houses within Edinburgh belonging to his lady, John Bonnar's relict, and now appertaining to Raploch *jure mariti*.

The Lords found *quod bona mobilia sequuntur personam*, and that not only his moveables then lying within the regality fell under the escheat and gift by the Lord of the Regality, but also all his moveables throughout the whole kingdom, and even his *jus mariti*. Which was judged an interlocutor very prejudicial to his Majesty's interest, and extending the Lords of Regality their rights to single escheats too far, seeing there should be no more in a Lord of Regality's power to dispose of but what lies within his own regality; and no person ought to grant gifts of escheats to extend farther than the bounds of their own jurisdiction. Yet Hope, *Min. Pr. tit.* 8, affirms they have right to single escheats. *Vol. I. Page* 104.

1680. *June* 26. EDMISTON *against* EDMISTON.

IN a case Edmiston of Duntraith against Mr John Edmiston, the Lords reduced a 7000 merks bond, as never being a delivered evident, but consigned on conditions; and ordained them to count *ab ovo* without respect to the bond. *Vol. I. Page* 105.

1680. *June* 26. LORD MONTGOMERY *against* The LAIRD of BLAIR.

LORD Montgomery, as superior, craved a year's rent of the adjudger. It was ALLEGED, The adjudication was before the 18th Act of Parliament 1669, ordaining adjudgers to pay a year's rent; and therefore it must be presumed not to be due before, seeing laws are only made to regulate future cases; and it was found *casus de industria omissus* in the Act of Parliament 1621, as Balmanno observes, *voce* Adjudications.

The Lords found a year's rent not due by adjudgers before the Act 1669. *Vol. I. Page* 105.

1679 *and* 1680. MARGARET JOHNSTON, Lady Bogie, *against* The CREDITORS of Sir JOHN WEYMES of BOGIE.

1679. *January* 17.—SIR John Weymes of Bogie having deceased in the tolbooth of Edinburgh; upon a bill given in by Margaret Johnston, (Warriston's daughter,) his lady, the Lords ordained the factors for the creditors to pay out of his estate 500 merks for his funerals; as also, to pay Patrick Vanse's dues as keeper, the time he was in prison. *Vide infra, 25th Feb.* 1679. *Vol. I. Page* 84.

1679. *Feb.* 25.—MARGARET Johnston, relict of Sir John Weymes of Bogie, upon a bill craving a yearly aliment from her husband's creditors, got modified to her by the Lords 600 merks for her expenses, mourning clothes, and trouble, in burying of her husband, albeit the Lords (17th January last) then modified 500 merks for defraying his funeral expense; and this albeit the creditors were all legally secured, conform to the laws of the kingdom, long before her contract of marriage, which she then knew; and so was *in mala fide et in lucro captando*, and they *in damno vitando*, and many of them very poor, and who by his being bankrupt would lose part of their sums. *Vol. I. Page* 44.

1680. *June* 29.—IN the Lady Bogie's case against her umquhile husband's creditors, (*Vide* 25th Feb. 1679) besides what they modified before for his burial, (which, he dying bankrupt, ought not to have been sumptuous,) they now ordained her upon oath to depone upon the truth of some further articles of debursements given out by her, that they might modify a farther gratification to her; seeing, if the creditors would be inhumane and cruel, yet the Lords might modify a sum for his funeral charges to come off his creditors. But this was thought a stretch of law, and that they had modified enough already for the burial of one who died in the tolbooth of Edinburgh.

Vol. I. Page 105.

1680. *June* 30. The TOWN of EDINBURGH *against* JAMES SCOT, SHERIFF-CLERK of LOTHIAN.

IN a suspension, the Town of Edinburgh against Mr James Scot, sheriff-clerk of Lothian, collector of the taxation imposed by the convention of the States in July 1679, for the hospital lands; the Lords found that, by an express clause of the said Act of convention, such lands as they could instruct were allocated and mortified to the use of their hospitals before 1656 were free of this cess; but the hospital's naked possession of them, though never so long, was not enough to give them the privilege and exemption: and find, though by mistake they paid for their lands, it lays no obligation on them so to continue, it being *indebité solutum*. *Vol. I. Page* 105.

1680. *July* 1. RANKIN *against* ARNOT.

It was ALLEGED a renunciation of an infeftment of annualrent was null, because it was not registrate within sixty days, conform to Act of Parliament in 1617. REPLIED,—That Act speaks only of registration of wadsets, and infeftments of lands and property thereof; but not of infeftments of annualrent; which is only a servitude affecting the ground, and so cannot be extended.

The Lords ordained it to be heard in their own presence; but some thought it did not deserve it, seeing the reason and equity of the statute, for securing the lieges, seems to be alike in both; only, statutes are *stricti juris*.

In the same cause, on the 8th July 1680, the Lords found a poinding unwarrantable, because it was upon an heritable bond, and not first loosed by requisition. *Vol. I. Page* 106.

1680. *July* 2. ALEXANDER GIBSON *against* LORD DUNKELD.

MR Alexander Gibson pursues a declarator against the Lord Dunkeld, as having lost and amitted his right of tutory of Mr Alexander's brother of the last marriage, because he had not made an inventory of the pupil's estate, conform to the 2d Act of Parliament 1672.

The Lords declared he had lost the office, and removed him as suspect; and would not allow him to purge the bygone *mora*, albeit he offered to make an inventary immediately, and the reason of the delay was, because one of the tutors nominated *sine quo non* was dead. *Quær.* if the tutory was expired thereby. The Act of Parliament seems not expressly to impose deprivation in this case, but only that such a tutor or curator shall lose his expenses; yet deprivation is deducible from the Act. *Vol. I. Page* 106.

1680. *July* 2. SMITH or BAIRD *against* AULDCORN and CARNEGIE.

IN a case betwixt Smith, wife to Mr Thomas Baird, advocate, against Auldcorn and Carnegie, the Lords found a behaviour as heir purged by this defence, That he had a probable cause of ignorance and mistake by his mother's contract of marriage, the lands being provided to the heirs or bairns of the marriage, upon which he apprehended he had a title as creditor; therefore the Lords allowed him yet to renounce, though he had immixed upon the mistake foresaid, he making all forthcoming; and if he did not purge and restore, then found him liable for the debt. *Vol. I. Page* 106.

1680. *July* 2. HUGH BROWN *against* MATTHEW M'KELL.

IN Hugh Brown, chirurgeon, his charge against Mr Matthew M'Kell, who ALLEGED he could not remove till his reparations were paid him; ANSWERED,—They were not absolutely necessary, and he had no warrant for them; and when he comes to pay the maill, he may crave retention, or he may pursue for them; but they cannot stop a removing.

The Lords upon report found the letters orderly proceeded, and decerned him to remove, reserving to him action for his reparations as accords.

Vol. I. Page 106.

1680. *July* 2. JOHN MAITLAND *against* ROBERT BAIRD, &c.

ROBERT Baird, late Dean of Guild of Edinburgh, &c. are pursued by Mr. John Maitland, master of the game in Mid-Lothian, for eating wild-fowl contrary to the late act of Privy Council. ALLEGED,—Being burgesses of Edinburgh, they are not obliged to answer before the Sheriff; and the town hath a private jurisdiction. *Vol. I. Page* 106.

1680. *July* 6. ANENT the KING'S SERVICE as HEIR to his COUSIN the DUKE of LENNOX.

THE King's Majesty was this day served heir in special to the late Duke of Lennox, his cousin. The fourteen eldest Lords of Session were the members of inquest, and the Lord Chancellor was chancellor to the assize. The four macers were judges. This was done to make a right and conveyance of that estate (whereof there was not much left) to his natural son Don Carlos. See Craig, *p.* 101, where he tells King James succeeded to the Duke of Lennox at this time.

Some called this service ridiculous and unnecessary, and thought the *jus coronæ* supplied all thir solemnities in the King's person. *Vol. I. Page* 106.

1678, *and* 1680. RALPH WILLIAMSON and MARY RAMSAY, his Spouse, *against* GEORGE CLAPPERTON of WYLIECLEUGH.

1678. *July 25.*—RALPH Williamson and Mary Ramsay, his spouse, against George Clapperton of Wyliecleugh, for reducing a decreet obtained by him in Feb. 1667 against them and Hopepringle of Torsonce, finding Torsonce's comprising satisfied by sale of lands, as it was prorogated by Act 62, Parl. 1661, and ordaining them to renounce in favours of Clapperton, who had right to the second apprising led by Kinnier of Forret, as if it had been the first.

The reasons of reduction were, 1*mo*, Because any intromission from 1657, in which Torsonce's apprising expired by the law then standing, and 1661, to which, by a supervenient Act it was prorogated, were all *fructus bonâ fide consumpti*; and so could never extinguish the comprising *ex post facto*. 2*do*, The 11000 merks paid by George Ramsay to Torsonce could not in law be ascribed in satisfaction of the comprising, because not paid after the legal, and not by him against whom the apprising was led, but by George *tanquam quilibet*. 3*tio*, Clapperton took a wadset of Wyliecleugh from Torsonce with absolute warrandice, for 18,000 merks: he did thereby homologate George's right, and was *in pessima fide* to acquire a posterior apprising in prejudice thereof. 4*to*, Though Kinnier's apprising be prior to Torsonce's, and both being prorogated by Act 1661, and the pursuers having right to Torsonce's, and being then and yet still minors, at least within twenty-five, they offer to purge and redeem Kinnier's apprising; and though this was refused in the former decreet, yet it was then only repelled for not production of Torsonce's apprising, which is now produced.

The defender opponed his decreet, wherein all this was proponed and repelled.

Glendoick, Register, having reported this, the Lords repelled all the reasons of reduction, except the minority; as to which ordained them to be heard, If, the legal not being run in regard of minority, the minor may not yet purge at the bar.

In this cause it was alleged against the taking a term, that the pursuers, being strangers, behoved to find caution.

The Lords found, if the decreet craved to be reduced was only a mere declarator of extinction of an apprising, they needed not now, in seeking reduction of such a decreet, find caution *judicatum*, but only *judicio sisti*; but if it bore conclusions for implement and payment, then caution behoved to be found. *Vide Annæum Robert. Rer. Judicat. lib.* 4, *c.* 11, *and Joan. Imberti Instit. Forens. lib.* 1, *c.* 30. *Vol. I. Page* 11.

1680. *July* 13.—In Ralph Williamson's reduction against Clapperton of Wyliecleugh, (25th July 1678,) the Lords, upon a bill, summarily ordained the depositions of the witnesses to be advised, which were taken to prove the minority of Mary Ramsay, Williamson's wife, and the time of her father's death; because this probation was only preparatory in order to the reponing her against a decreet obtained against her when she was minor, and her husband was a stranger. *Vol. I. Page* 107.

1680. *July* 14.

The Lords reduced an interdiction, because the publication did not bear three oyesses given. *Vide supra*, 21st Feb. 1680, where a horning and its denunciation is annulled for the same cause. *Vol. I. Page* 107.

1680. *July* 14. The Chirurgeons of Edinburgh *against* Patrick Cunninghame, an Apothecary.

In the Chirurgeons of Edinburgh their cause against Patrick Cunninghame, apothecary, to get him discharged as unfree to exerce any part of chirurgery; the Lords having advocated the cause from the Bailies, and appointed it to be summarily debated upon the bill, yet he extracted an act of advocation; the Lords ordained him to answer presently, notwithstanding of that act. This was done upon Forret's report, because it was stolen forth after they were ordained to answer *in causa* presently. Yet, a week or two before this, they would not recal Cranston's advocation against George Heriot, though it was of an action of removing, and George had set the house to another tenant, and was engaged to enter him at the term, and they were taking instruments against him for not entering them, to make him liable in damages.

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See *30th June* 1687, *the Chirurgeons of Edinburgh* against *the Apothecaries*.

1680. *July* 15. The Magistrates of Glasgow *against*

The Bailies of Glasgow having paid a fine to the Lord Ross, (to whom the king and privy council had gifted it,) for suffering two malefactors to escape; the Magistrates, having at last got the two malefactors, pursue them, having first discussed their jailer and his cautioners. They alleged, they were not liable, because they broke not the prison, but, finding the doors open, they came forth; which they might lawfully do; and the title whereupon they could be convened

in law was only *de effractoribus carcerum*, whereof they were not guilty. This suffered some debate with the Lords; which seemed strange. At last they found them liable, being put in for crimes, and not for civil debts; and therefore repelled their allegeance. *Vol. I. Page* 108.

1680. *July* 15. HAMILTON *against* PATRICK CUNNINGHAM and his WIFE.

IN Hamilton's improbation against Mr Patrick Cunningham and his wife, Lord Saline found the husband's offering to abide at the truth of the disposition offered to be improven was not sufficient, though the rights thereof were now wholly his, *jure mariti:* but since the disposition was pretended to be granted by her former husband to his wife, now married to Mr Patrick, that she ought principally to abide at the truth of it. *Vol. I. Page* 108.

ACT ANENT ADMISSION within the BAR.

THE Lords make an act of Sederunt, that none be permitted to come within the bars of the Inner-House, of whatsoever condition or quality. This was made upon Duke Hamilton's account, in his cause with the Town of Linlithgow. But they complimented the Duke so far as they declared that they dispensed with it in his person, because he had been admitted to enter before; but cautioned it as no ways due. *Vol. I. Page* 109.

1680. *July* 21. ARCHIBALD TURNER and JAMES PILLANS *against* HUNTER.

MR Archibald Turner and Mr James Pillans having, as apprisers, set a tack of the lands of Eastcraig to one Hunter for payment of six chalders of victual yearly, they charge him for the tack-duty of the lands. He suspends on this reason, That Patrick Hepburn, his former master, did violently take his farms from him: which being a *vis major* beyond his power to resist, it must assoilyie him; it being no less than *terror mortis, et justus metus qui cadere potest in constantissimum virum*, having threatened to kill him, and robbed his barn-yard.

Castlehill repelled this reason, seeing the tenant must be liable to those who set the tack to him: and if his master robbed his corns violently, he may either pursue a riot against him criminally, or pursue him civilly for a spuilyie, and recover them again with the violent profits. And having reported it to the Lords, they likewise repelled it as irrelevant.

This seems exceeding hard for poor tenants, whose rusticity and ignorance *in apicibus juris* is very excusable, there being no collusion betwixt him and his former master. *Vol. I. Page* 109.

1680. *July* 28. MEIKLE *against* MACKIE of DOULACH.

IN a suspension, Meikle against Mackie of Doulach, the Lords ordained, even in suspensions where reasons were referred to the charger's oath, that acts be extracted before they depone; unless they were present at the bar the time of the debating of the cause; though it be ordinary to take their oath without extracting. *Vol. I. Page* 111.

1680. *July* 28. WATSON *against* LORIMER, and FORBES *against* BOYD.

THE Lords, in two several actions, *viz.* betwixt Watson and Lorimer, and betwixt Mr Thomas Forbes, advocate, and one Boyd, refused to receive in bills complaining upon acts as unwarrantably extracted; but referred them to a reduction thereof. See the act of Sederunt 1679. *Vol. I. Page* 111.

ANENT NOTARIES and the CLERKS of SESSION.

There was likewise an Act of Sederunt made anent Notaries; and a motion that the clerks of Session should all be admitted notaries: which was thought a disparagement, seeing they, *in actibus officii*, are more trusted and credited than notaries, and in extrajudicial matters they will not negotiate as notaries. This was moved to bring in some money to Laurance Oliphant, now clerk to the notaries, and to the register, his constituent. *Vol. I. Page* 111.

1680. JAMES ALLAN *against* AGNES KER.

February 11.—IN the competition for maills and duties, betwixt James Allan, writer to the signet, and Agnes Ker; Allan propones improbation by way of exception against Agnes her general charge to enter heir, whereon her adjudication proceeded, in respect the same had been cutted, and likewise Mr John Hay's name had been inserted in it. When she came to abide at it, the Lords, upon a report, found it sufficient that she abode at the said charge, in so far as concerned herself, and not in so far as related to the said Mr John Hay. See *12th Dec.* 1679, *Robertson.* *Vol. I. Page* 84.

July 9.—IN James Allan's improbation of Agnes Ker's adjudication, (11th Feb. 1680;) ALLEGED,—Her assignation to one of the bonds whereon the adjudication is led, is posterior to her charge against the heir of Stevenson the debtor, to enter; which is a nullity. ANSWERED,—She is cautioner in that bond, and paid it, and so she was creditrix even for that sum by the clause of relief, at the time of her charge to enter heir; which is sufficient to sustain it.

This being reported, the Lords sustained Agnes Ker's adjudication so far as to come in *pari passu* with James Allan, as being led within year and day of his, (though in effect they were both obtained and infeft in one day, but in regard of the defect foresaid quarrelled in her's they gave James Allan's the pri-

ority,) and ordain her to pay to James the expenses of his adjudication and infeftment.—But as to this he will be found more than paid by his intromissions already, which must be ascribed *primo loco* to his expenses. See Jan. 1672. Several of the Lords thought there was no informality at all, but were for sustaining her adjudication simply. *Vide infra*, 30th July 1680.

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1680. *July* 30.—In the action Allan against Ker, (9th July 1680,) her charge to enter heir having been produced, with the rest of the grounds of her decreet of adjudication, and being objected against as vitiated and informal, and taken once or twice to interlocutor, and at last being tint out of the process by the negligence of the clerk; the Lords, upon a bill, ordain all parties suspect or interested to be examined anent the abstracting of it. Whereupon the parties their advocates and agents being examined, they denied that they knew what was become of it; but deponed anent the tenor of it, (but knew not the witnesses' names in the execution,) and that they had frequently seen it.

The Lords having considered this, they found,—partly by the depositions taken of parties and witnesses, with the second extract of the general charge to enter heir taken off the signet, and copy of the execution produced, and the decreet *cognitionis causa* following on that charge to enter heir, and narrating the tenor thereof, with the date of its execution and the name of its messenger-executor; as also the decreet of adjudication produced, and Pitmedden's former reports relative to this same charge; and the recency in their memories of what was then done when this charge was then quarrelled;—they find the tenor of the said general charge to enter heir at the instance of the said Agnes Ker against umquhil John Stevenson, and executions thereof, sufficiently made up, verified, and proven. And this summarily on the grounds foresaid, without putting her to a new process, in respect of their private knowledge, and that it was yet recent in their memories. And the Lords declared the second extract or copy of the execution now produced, (albeit the same wants the witnesses' names,) shall make as much faith as the principal as to the interest of the said Agnes Ker allenarly, but not of Mr John Hay.

It is now a usual practice of the Lords to make up, upon a bill, writs lost out of processes, where they have been seen and produced, and lost during the dependance. Yet thus a false evident may be produced once, and purposely lost, and then the tenor of it made up; which tenor cannot be improven, the principal being wanting: and which trick Haddington, in a decision, *21st June* 1611, *Lady Dunbreak*, tells us was done in his time; but see him *4th* and *6th March* 1612, *Lochinvar*. *Vol. I. Page* 112.

1680. *July* 31. ANENT the TOWN of EDINBURGH'S IMPOSITION on ALE.

THE Lords of Session gave their consent to the new gift of imposition granted by his Majesty to the Town of Edinburgh, for twenty-two years, of two pennies Scots upon every pint of ale sold within the Town; and the advocates (whereof few were present, being the last day of the Session,) being called in, and this being intimated to them, and they not protesting against it, nor opposing it, their silence was reputed for a sufficient consent. The reason why the

Town required the assent of the College of Justice was, in respect they had the Town, by contract in 1669, obliged never to seek a renovation or continuation of that gift. *Vol. I. Page* 112.

1680. *July* 31. WILLIAM MURRAY, Advocate, Petitioner.

MR William Murray, advocate, having offered to discover, *ad levamen et exonerationem conscientiæ*, that he knew his brother, the tutor of Stormonth, had bribed and suborned witnesses in Annandale and Sir Robert Crichton's affair; the Lords, in regard he was not able to come abroad through indisposition of his feet, ordained three or four of their own number to go to his chamber, and examine him *ex officio* thereupon: but thereafter John Murray, the tutor, having assured the Lords that he was hypochondriac and melancholy, they appointed him first to be visited as to the condition of his health and temper of his body; and he was found to be furious and deeply melancholic.

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1680. *October*. SEATON of CARISTON'S DAUGHTERS *against* Their FATHER and his CREDITORS.

SEATON of Cariston's two Daughters raised a libel for aliment against their Father and his Creditors. The Lords considering that they were come to age, and that their father offered to entertain them in his own family, (though they affirmed that he had used them most barbarously,) referred them to the Judge Ordinary, and recommended to them to go home and stay in their father's house. *Vol. I. Page* 113.

1678 *and* 1680. COCHRANE of RUCHSOLES *against* ENTERKIN, CARLETON, and OTHERS.

1678. *February* 2.—THERE is a reduction and improbation pursued by Cochrane of Ruchsoles, as heir to his father, (who had apprised some lands in Galloway and served inhibition,) against Cathcart of Carleton, Enterkin, Sir John Cochrane of Ochiltrie, Hugh Wallace, writer to the signet, and the other possessors of the apprised lands.—See thir parties, *6th November* 1680. *Vide supra, numero* 681, [page 207.]

ALLEGED,—They would not take a term to produce to him; because they offered to prove they stood infeft publicly and in possession, and, he nor his father not being infeft, he could not force them to produce their rights whereon infeftment had followed.

ANSWERED, 1*mo*,—Ought to be repelled, because a dilator not verified. 2*do*, He had charged the superiors with horning to infeft him, *viz.* my Lord Cath-

cart, &c.; which was equivalent. (This horning the defenders contended, though it was sufficient in an action of maills and duties, yet not in an improbation. *Vide* thir same parties, *24th July* 1678.) *3tio*, In an improbation, they behoved once to produce, and then debate on the validity of their right; though, in a naked reduction, they would not, (unless they immediately secluded him by production of a better right.)

Reidfurd ordained them to take a term.

Next, ALLEGED, Their authors were not called.—We desired them to condescend, and they should be cited to the same term.

This answer was sustained as relevant.

Advocates' MS. No. 720, *folio* 318.

1678. *July* 24.—In the reduction pursued by Cochrane of Rochsolls against Carleton, &c. (2d Feb. 1678;) they having given in a condescendance upon their authors in the lands, it was alleged no respect could be had to the said condescendance, because severals of them were not designed, and they might as well give in the names of jockeys and vagabonds, or forge names; and it was not sufficient to condescend on the shire where they lived, but at least they behoved to tell the parish, that if there were no such person dwelling there, they might get a testificate from the minister and elders thereon, or might at least cite him at the market-cross of that shire. *Vol. I. Page* 11.

1680. *November* 6.—In the improbation, Mr William Cochran of Ruchsoles against Enterken and others, (24th July 1678,) the Lord Newton would not sustain nor allow the craving a certification against the right of lands or other heritable titles, whereupon infeftments had actually past, upon Ruchsoles's personal interest, as a creditor, and one who had inhibited; and found that none but one infeft could seek improbation of real rights of lands: albeit it was alleged that *actio falsi est popularis et cuivis competit;* and that improbations have been sustained at the instance of one who was only served heir by a general retour; and that a creditor had interest to remove all obstacles out of the way, and then he might affect it by a real diligence himself. Others affirmed this ought to precede ere he could have interest to quarrel the rights of lands wherein as yet he hath no right. *Vide* Durie, *4th February* 1630, *Earl of Kinghorn.* It seems, any may propone improbation, though not infeft.

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1680. *November* 6. JAMES DEAS *against* His TENANTS.

ONE hath an infeftment of annualrent, and a decreet of poinding the ground thereupon: he dies; and, while the son is making up a title, the debtor who granted the annualrent dispones the land to another, who, by virtue thereof, possesses a year or two: the heir of the annualrenter, being now infeft, pursues not only for a poinding of the ground, but likewise convenes him who intromitted by virtue of the disposition, *personali actione*, to refund.

Newton refused process against him, they being *fructus bona fide percepti.* But he may be in some mistake; for Durie, *15th March* 1637, *Guthry*, tells, the Lords sustained a pursuit of the same nature, and declared they would follow this decision in all time thereafter in all such cases. *Vol. I. Page* 114.

1680. *November* 9. ROBERT YOUNG *against* —— YOUNG and JAMES EWART, her Husband.

ROBERT Young, merchant in Edinburgh, pursues before the sheriffs of Edinburgh, —— Young, relict of George Hutchison, vintner in Edinburgh, and James Ewart, now her husband, for payment of 400 merks, owing by her former husband's bond.

ALLEGED,—She was executrix confirmed *qua* creditrix, and the inventary was exhausted partly by her own debt, and partly by payments made to other creditors before his citation.

The sheriff, before answer, ordained her to produce the confirmed testament, and the instructions of her payments. Advocation is raised upon sundry reasons, whereof this was one, that the sheriff had committed iniquity, and exceeded his power, in making an act before answer; which *officium nobile* is only competent to the Lords, and not to be usurped by inferior judges, to shun the determination of the relevancy till they have all the probation lying before them.

ANSWERED,—It was their ordinary practice, and there was no material injustice to ordain her to produce the testament; and the shunning to decide the relevancy was rather in her favours than against her.

Many thought the Lords would be jealous of allowing any but themselves to manage these Acts before answer, which themselves had but lately invented; however, my Lord Haddo was to give us the Lords' answer on it; as also on this point, Whether the sheriff did right in modifying the funeral charges, and expenses of the confirmation of the testament, upon their own particular knowledge what those things commonly stand or amount to in a person of his quality and condition, without first taking probation what was expended thereon: for, suppose they were truly debursed, yet, if exorbitant, a judge may tax and modify them. *Vol. I. Page* 114.

1680. *November* 10. LUMSDEN of INVERGELLY, Petitioner.

ON a petition of Lumsden of Invergelly, representing that he is minor, and that he is willing to abdicate and renounce all his estate in favours of his creditors, and that it be rouped and set for their behoof, according to the priority of their diligences,—therefore craving to be liberated from personal execution by caption:

The Lords granted the desire of this bill, he renouncing his whole estate to his creditors; and this no wise prejudging the several real diligences against the same. See Durie, *25th June* 1624, *Somervil.* *Vol. I. Page* 114.

1680. *November* 10. LADY KINCARDEN, Petitioner.

LADY Kincarden craved that her son's estate might also be rouped for the use of the creditors, as to the casual rent of coal and salt: which was done, but far below the former tack-duty; which was thought not to proceed as if the coal were become worse or wasted, but by collusion, that the superplus of the tack-duty might secretly come in to the Lady and her son.

But I think the creditors might, to avoid this cheat, take it in their own hands, and offer caution to account for more. *Vol. I. Page* 115.

1680. *November* 10. JAMES LANDS *against* JOHN LUTFOOT.

IN the charge at the instance of James Lands against John Lutfoot; the suspender adminiculating the marginal note in the testament used by him, (which was vitiated,) by a letter of Corser's, the Lords found the letter not probative unless it be proven holograph and of the date it bears; and, before answer, ordain the witnesses inserted in the testament, yet in life, to be examined anent the revocation of James Lands's assignation, contained in the marginal note, if it was there when the testament was subscribed; and if the note was then of the same tenor that now it is of.

Then James having given in a bill for getting Mr David Watson examined, who dictated the said testament, (though he be not a witness in it,) and knows the said note is false, and affixed since; the Lords declared they would first hear what the witnesses said, and, at the advising, if they saw cause, they would then take Mr David's oath.

It was further ALLEGED against James Lands's assignation, that it was null, being an undelivered evident the time of the cedent's death. This was repelled, in respect it bore a clause dispensing with the not delivery. *2do*, OBJECTED,—Offered to prove, by witnesses who saw it, that the said assignation was blank, and James's name was only filled up since his cedent's decease.

The Lords found this not probable by witnesses, but only *scripto vel juramento*, since James's name now stood filled up in it; and so his assignation could no otherwise be taken away.

3dly, ALLEGED,—That his assignation, being gratuitous, behoved to be affected with the funeral charges of the cedent. This was repelled, in respect of thir two answers:—1*mo*, That Lutfoot had not debursed them. *2do*, That there were as many moveables as would have done it. *Vol. I. Page* 115.

1680. *November* 12. WILLIAM BROWN *against* THOMAS WILSON.

THE Lords refused to take the oath of Mr David Dewar, advocate for Brown, upon this allegeance made by Wilson, That he offered to prove, by his said advocate's oath of calumny, that Brown had referred his libel to Thomas Wilson's oath, and he had deponed negatively thereupon, and so was assoilyied; seeing

the oath *non constabat ex actis* and the clerk's minutes, (which is the only probation in such cases,) he having omitted to write the oath, which was taken at the side-bar. And they found an oath which was not extant *in scriptis seu retentis* could not be made up by an advocate's oath. *Vol. I. Page* 115.

See 23d Dec. 1680, page 384.

1680. *November* 13. HUGH BLAIR *against* ROBERTSON and CHAPMAN, her Husband.

IN Hugh Blair's pursuit against one Robertson, that was his taverner, and —— Chapman, now her husband, for his interest, the Lords having advised the probation which was led on an act before answer, anent the vitiation in the count-book keeped betwixt them, they decerned, conform to Hugh's count-book, which bore in the controverted article, that she had only paid him two pieces of wine such a day, whereas her book bore, that she had counted to him for four pieces, which could not prove in her own favours; especially seeing, the writer of both books being examined, he owned Hugh's book.

Yet she offering to prove, by Hugh's wife's oath, that her book was juster and righter in that particular than her master's; though it was alleged she was *vestita viro*,—yet the Lords ordained her to come in and depone without any new act, being in a concluded cause, because she was *præposita negotiis*, and in use to count weekly with her servants and taverner. And they received it *hoc loco*, though it was contended it should have been proponed in the first act, because it was instantly verified by the pursuer's wife's oath, who lived in town, and it was only an act before answer. Yet, by an Act of Sederunt, 23d July 1674, these acts are declared to be equivalent to acts of litiscontestation.

Then she having denied it, it was ALLEGED there could be no decreet, because the price of these two pieces of wine was not yet proven. This was repelled, in respect of the notoriety of the quantity a piece consists of, and that each pint was sold at twenty-pence, allowing so much to her for dreg and leakage.

Thereafter, on the 20th of November they referred to Hugh's oath, that he had charged her with a piece of wine which was returned to Gilchrist the merchant. He deponed, that piece was returned, but that he substituted and put another in the place of it. At advising, it was ALLEGED, that this quality of giving her another piece was extraneous, and behoved to be otherwise proven. The Lords refused to divide the oath, but found the quality competent and intrinsic, there being no other probation but his oath. *Vol. I. Page* 115.

1680. *November* 16. KATHERINE CARNEGY and THOMAS ALLAN, her Husband, *against* The EARL of SOUTHESK.

IN Sir David Carnegy of Pittarrow his double poinding against his sister Katherine and Thomas Allan her husband, on the one part, and the Earl of Southesk on the other; the Lords, *nem. con.* preferred the sister's right by bond to Southesk's precept which he had got from old Pittarrow upon Sir David

his son, ordering him to pay to the Earl (out of that money he owed him) what the Earl had advanced for his brother; and that because the precept wanted witnesses, and was not intimated before her bond; though they offered to prove it was holograph, by old Pittarrow's oath, and to prove it was intimated, by the oath of young Pittarrow. But the Lords would not admit of this manner of probation to her prejudice. *Vol. I. Page* 116.

1680. *February* 9. PETER DE BRUIS *against* The EARL OF WINTON.

PETER de Bruis, a Flandrian, gave in a complaint against the Earl of Winton, anent the building of a harbour at Cockenny, craving that the Lords of privy council would nominate some to visit it, and consider his pains, and modify against the Earl accordingly. The Lords at first named a committee, but thereafter they remitted it to the Session, the judge ordinary, to be summarily discussed by them. *Vol. I. Page* 84.

1680. *June* 29.—The Lords finding the grossness of the difference betwixt the reports of the arbiters, therefore renew the commission, and adjoin the Lord Justice-Clerk to my Lord Harcous; and ordain the two arbiters to be cited before them, and to be examined if they measured the harbour-work severally, or together. And, in regard that Fulton the Earl's arbiter measures by feet, and Baxter arbiter for Bruis measures by roods, ordain them to reduce the measure to one common denomination, whether of feet or roods, and to value what Bruis hath done conform to the scheme agreed upon betwixt the Earl and him; and what is unwrought of that scheme; and what additional work he hath wrought, not contained in that scheme; with special regard always to the quality, goodness, and sufficiency of the work; and allow the foresaid Lords to call other wrights and masons before them, and examine them upon oath anent the work, and value of the additional work, whether they think it more or less than what De Bruis was obliged to do by the scheme, and which is yet undone by him; and to report. *Vide infra*, 30th July 1680. *Vol. I. Page* 105.

1680. *July* 30.—IN the action pursued by De Bruis against the Earl of Winton, (29th June 1680,) the Lords having considered the Justice-Clerk and Harcous their report, they modify about 1600 merks, as yet resting by the Earl to him for his work besides what he hath received; and reserve him action for his boats and plenishing alleged seized on by my Lord, as accords.—But the contract betwixt them appoints that the boats shall belong to my Lord. *Vide* 23d Nov. 1680. *Vol. I. Page* 111.

1680. *November* 23.—In this action, the Lords find that the decreet being *in foro*, and pronounced the penult day of the last Session, and a petition given in for the Earl the next day, and refused; that any defences, which were competent and omitted formerly, cannot now be received: but allowed the suspender to be heard upon any error which hath been in the calculation of the sums, and that before the Lord Justice-Clerk and Harcours, to whom they remit the consideration thereof: and sustain the price of the coals to be 100 pounds sterling, in respect of the submission produced, unless the charger offer to prove, by the Earl's oath, that the submission was blank as to the price and

number of the coals when it was delivered up, and that the charger paid for the carriage of the coals or allowed the same to the Earl; and adhere to the former modification of 1000 merks contained in the decreet.

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1680. *February* 4. JOHN THOMSON *against* LADY SPENCERFIELD.

WILLIAM Napier of Wrights-houses being dead; John Thomson, an officer in Edinburgh, being son to William Napier's grandfather's brother's daughter, gave in a bill to the Lords, showing his right of blood, and craving that the corns, cattle, and other plenishing which were perishable, might be sequestrated in a responsible man's hands till it were found who had best right. The Lords granted this.

Then the Lady Spencerfield, pretending she was nearest in blood, (but now it is alleged the person from whom she connects her right was a bastard,) and competing, there were mutual bills given in to the Lords by either party, craving that their witnesses (who were very old,) might be examined, to instruct their propinquity of blood. The Lords refused this, but ordained the witnesses to be examined, the time of the service before the inquest.

Then by bills, they craved, lest one should steal forth brieves clandestinely, the other not being present, and so serve thereon, that the Lords would ordain them to be summoned thereto. The Lords discharged the director to the Chancery to give out any brieves for serving any of the parties contending, till such time as they report to him an instrument, bearing that they have intimated by a notary to the other party concerned, both the day, place, and judge before whom they are to serve, that they may compear, and object if they please.

Upon an apprehension that there was not an heir within ten degrees, Mr Andrew Forrester got the gift of his *ultimus hæres* for the Earl of Murray's behoof. And the service being fixed to the 19th of March, and three Lords being joined as assessors to the macers, on the said day, the King's advocate appeared for the donatar's interest, and produced his gift, and craved up the verifications of the contingency by writ, and the names of the witnesses, to see till another day. Which, though unusual, yet was granted, and the service was continued till the 23d of March. Before which day, there was an advocation of it passed to the Lords, only to delay and weary out the poor man, pretending that intricate points would arise on the probation, which none could decide but the Lords. Yet there was no such difficulty but what the three assessors might have determined. *Vide infra*, 8th June 1680. *Vol. I. Page* 82.

1680. *June* 8.—The heirs of Wrights-houses (*de quibus vide* 4th Feb. 1680,) craving by bill that their witnesses might be examined, (they being old, and one of them dead since the advocation,) for proving their contingency of blood, seeing the rest might likewise die before discussing of the advocation from the macers to the Lords; the Lords refused the bill, because the macers would regard no testimonies of witnesses but them that were examined in their own presence.

It was moved by one of the Lords, that the macers and assessors might convene the assize, and in their presence take the probation, to lie *in retentis*, and proceed no further. This was also refused; because the advocation standing undiscussed superseded all procedure, and the roll of causes being far advanced, it would come in within a few weeks, and the testificate of the witnesses' age and infirmity did not bear upon soul and conscience.—This was judged by some hard measure, to gratify the Earl of Murray. *Vide infra*, 24th Nov. 1680. *Vol. I. Page* 101.

1680. *November* 24.—The advocation against John Thomson, the heir of Wrights-houses, (8th June 1680,) was this day discussed, and the service remitted back again to the macers, with this caution to the inquest, to see the probation be clear as to the contingency of blood. And accordingly the inquest served him heir, though one of his witnesses died *medio tempore*.
Vol. I. Page 118.

1680. *November* 25.

THE Lords made an Act of Sederunt, that Advocates adject to their returns of processes, whom they are only for, when there are more persons pursued as defenders, and several advocates appearing for them. *Vol. I. Page* 118.

1680. *November* 26. The LADY KINGLASSIE *against* JAMES ALEXANDER of KINGLASSIE.

THE Lady Kinglassie elder pursuing Mr James Alexander of Kinglassie; he ALLEGED against the execution, that it was null, because it doth not design him as the Act of Parliament 1672 requires, but only bears *the within designed Mr James Alexander*, and in the summons he is designed spouse to Rachel Ayton, heiress of Kinglassie.

Though this was a certain enough designation, yet the Lords found the execution null, and that a man ought not to be designed by his wife, which were *ordinem naturæ turbare*. *Vol. I. Page* 119.

1680. *November* 30. MRS JANE MAXWEL *against* The TOWN of DUMFRIES.

MRS Janc Maxwel, who had adjudged Mr William Maxwel his estate, and obtained a decreet of maills and duties against the tenants in absence, and thereon apprehended one of them, and incarcerated him in the tolbooth of Dumfries, pursues the town of Dumfries for payment of 5000 merks, due by the said tenant, whom they had suffered to escape.

The defences were, 1*st*, It was *casu fortuito*, for he had come out by false keys. 2. They can be decerned for no more than what the tenant was owing; and *ita est* his year's rent and maill was not 600 merks. REPLIED,—There was *culpa* in them, in so far as they had not a cat-band on the door, conform to the Act of Sederunt 1671, and a keeper at the door. To the 2*d*, She had a standing

decreet against the tenant for 5000 merks by year, as his maill and duty; and being imprisoned for that, till the decreet were reduced, the Town behoved to be liable for that sum.

DUPLIED,—The decreet was in absence, and though the tenant could not be now had to depone on the yearly quantity of his true rent, yet they were content to admit to her probation what duty he paid, and to be liable for that; and offered to prove the whole barony (whereof he was a tenant but in a small part,) did not pay so much by year as she had taken decreet against that one tenant for.

The Lords repelled both defences, and found the town liable for the whole sum decerned against the tenant; and refused to take a probation anent his true rent.—This, as very hard, the town reclaimed against by a bill; but if it was on the account that the decreet was standing unreduced, it seems the Town, for their own liberation *pro tanto*, had interest, without the tenant's concourse, to raise a reduction of that decreet, and prove what was his true yearly rent.

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1680. *December* 1. The OWNERS of an ELEPHANT *against* ALEXANDER DEAS and the Other FARMERS of it.

THE owners of the Elephant which was brought hither from England to be shown, having charged Alexander Deas and the other farmers of it, on their contract, to pay 400 pounds sterling for the use of it several months, they presented a bill of suspension on sundry breaches and contraventions of the said contract; such as, they did not show it at the precise hours appointed, and took advantage by showing it privately, for which they have not accounted; and did not show all it might do, *viz.* its drinking, &c. But it could not drink every time it was shown. *Vol. I. Page* 119.

1680. *December* 1. RIDDEL of HAINING *against* MARY JOHNSTON.

IN Riddel of Haining's case against Mary Johnston, the Lords found that the act of grace in March 1674 was sufficient to defend one against a pursuit for deeds of usury done preceding that act, it pardoning all penal statutes and crimes, except capital ones; and *favores sunt ampliandi et latissime interpretandi*. Yet such rogues should not so easily escape. Likeas, in November 1677, the Lords found that bailies of regalities' fines were comprehended in this act, and discharged by it. *Vol. I. Page* 120.

1678, 1679, *and* 1680. BEATSON of POLGUILD *against* BEATSONS of KILRIE and SOUTHGLASSMONTH.

1678. *July* 19.—IN the action pursued by Beatson of Polguild against

Beatsons of Kilrie and Southglassmonth, the Lords assoilyied them from the qualifications enforced by the pursuer against them, to make them liable and accountable to him for omissions, as they who had acted as protutors, *viz.* that Kilrie had meddled with the charter-chest, and taken out papers, &c.: which the Lords did not find sufficient to make him protutor; for they remembered, in Scrimzier and Wedderburn of Kingennie's case, they had found a greater meddling than that no acting as tutor. See, anent deeds importing protutory, the case between Ellies of Southside and Charles Carse, decided on the 18th November 1671. *Vol. I. Page* 10.

1679. *January* 23.—At Session, a bill was given in by Mr John Ellies, advocate, and Beatson of Kilrie, against Beatson of Polguild, who had threatened Kilrie in the Session-house, that he would kill him; and said, that Mr John Ellies had betrayed General Dalziel in his causes. Though threatening does not infer tinsel of the plea by the Act of Parliament, which speaks only of beating and wounding, yet it is *crimen in suo genere*, especially in the Session-house. And therefore the Lords recommended to Newton, in order to the punishing of the parties, that he should examine both parties, and witnesses, upon the whole circumstances of the bill. See the process depending betwixt thir parties, July 19, 1678. *Vol. I. Page* 36.

1680. *December* 2.—Beatson of Polguid against Beatson of Kilrey, (as to their qualifications of tutory,) was this day decided; and the Lords modified the value of the coal intromitted with, to 1200 merks yearly. *Vol. I. Page* 120.

1680. *December* 3. GOLDIE *against* The TOWN of DUMFRIES.

The Lords having advised this case, they found it sufficiently proven that the citizens contained in the Act of Exchequer had given bond for the taxation 1633, and had paid it; and so it was not discharged by the Act of Grace in March 1674, but that it fell within the exception of that Act. And the Town urging presumptions that it was paid, the engagers being magistrates, who would not fail to obtain payment, and being in an Act before answer, the Lords allowed the Town to adduce what documents they could, to astruct the same was paid, being *in re tam antiqua*, and so presumed to be paid. And, as to the interruptions of the forty years' prescription, they found a caption without an execution was not a sufficient interruption, unless the letters of horning and execution and denunciation whereupon the caption proceeded were also produced, or extracted from the register of hornings; though a caption presupposes a charge of horning to have preceded.

Then ALLEGED,—the summons being in 1675, the term's taxation in 1636 was within the forty years. Then minority of some was offered to be proven; but it must be the minority of the executors, to whom this sum would have fallen, and not of the heir, to whom it did not belong. That the king's taxation falls not under prescription, or that the years of the surcease of justice in 1659, &c. should be deduced, I think would be repelled. *Vol. I. Page* 120.

1680. *December* 7. The Royal Fishing Company *against* Halton.

His Royal Highness the Duke of York being present, the members of the Royal Fishing Company represented, that his Majesty, by his 5000 pounds sterling of capital or stock, having fifty votes, each 100 pounds giving a vote, and delegating the whole fifty votes to one person, *viz.* my Lord Halton, he engrossed the whole administration of the society into that one person's hands; which made the affair suffer exceedingly in its true interest; for, the fifty votes being the plurality, Halton carried these many years what he pleased; so that they needed only ask his suffrage, which made it resolve in a monopoly.

The Lords (contrary to the Duke of York's private opinion,) took the courage to show their justice and decide against the King; and found, by the contract of copartnery, one proxy could not have all his votes; (though I think it was and is yet lawful to vote by proxies:) but if his Majesty pleased to dispose on and parcel out his votes to fifty several persons, they would each of them have a vote; as my Lord Tweeddale had assigned his son Yester to 100 pounds of his, and so given him also a vote. For Sir G. Lockhart urged that *plus vident oculi quam oculus*; and fifty persons would consult more rationally, and fall upon better expedients for the good of the whole society, than any one man. This touched Halton. *Vol. I. Page* 121.

1680. *December* 10. The Earl of Home *against* His Vassals.

In the Earl of Home's reduction and improbation against his vassals; alleged for some of them,—I cannot take a term to produce any writs but those granted by yourself, seeing you produce nothing but a seasine in your own person which does not proceed upon a retour, (for that would also instruct that your predecessor was infeft,) but upon an adjudication led against yourself, as lawfully charged to enter heir, by Sir Andrew Ramsay of Abbotshall, and now returned in your own person.

This being reported, the Lords found the defence relevant; and that, by virtue of his title in process, the defenders were not obliged to produce any older rights than such as were granted by himself; (and if they had none such, then the certification would do them no hurt;) unless he would produce charters, retours, and seasines standing in his author's and predecessor's persons; in which case, the defenders behoved to produce all posterior rights, unless they excluded him by an older right.

But if it once appear, by their own production, that he is their superior, then he will force them to produce to him all their rights. *Vol. I. Page* 121.

1679 *and* 1680. John Elphingston and the Master of Balmerino *against* The Earl of Lothian.

1679. *January* 24.—In the action John Elphingston and the Master of

Balmerino against the Earl of Lothian, for payment of a sum contained in his father's bond; ALLEGED,—It was a public debt, and never a delivered evident; and James Chalmers, advocate, found it among Sir Thomas Nicolson his master's papers, blank in the creditors' name, with a memorandum about it that it belonged to Balmerino.

Sir Thomas's heirs also appeared, and craved to be preferred thereto.

The Lords repelled (the Nicolsons) their right; and, before answer to Balmerino's claim, ordain the witnesses inserted in the bond (if alive) to be examined, where and when it was subscribed, and what the parties designed at the time, and what was the cause of the granting the said bond. And also ordain Mr Mark Cassie of Cockpen, the Lord Jedburgh, Campbell of Cesnock and others, to be examined if this bond was ever spoken of or mentioned by Balmerino, the time of the treaty and communing betwixt him and old Lothian; and whether Balmerino refused to subscribe a general discharge, because this bond was not excepted therefrom. *Vide* 10th December 1680. *Vol. I. Page* 36.

1680. *December* 10. In Balmerino's pursuit against the Earl of Lothian (24th Jan. 1679,) the probation being this day advised, the Lords found that the bond of 20,000 merks was *ab initio* blank, and that it was unwarrantably filled up in Balmerino's name, and unjustly delivered up by James Chalmer, advocate, being found by him among his master Sir Thomas Nicolson's papers. And seeing, by the depositions of the witnesses examined *ex officio*, it does not appear that either it was for a true onerous cause, or what were the terms of the depositation, the Lords find the said bond void and null, and suspend the letters *simpliciter;* and assoilyie the Earl of Lothian from it.

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1680. *December* 14. DUMBAR of HEMPRIGS *against* LORD ARBUTHNOT

DUMBAR of Hemprigs against Lord Arbuthnot being reported; the Lords found, though the debt was the Lady Arbuthnot's, the defender's stepmother, and that it was never constituted against her husband in his lifetime, yet this Lord, as heir served to him, ought to be liable for her debt *in quantum* either he or his father were *lucrati* by that marriage, with a deduction always of the *onera matrimonii*. And ordained the pursuer to condescend on the *lucrum*, and the defender on the burdens.

The words of the interlocutor, as they were dictated to the clerk, were,—"Find, albeit the marriage be dissolved, and that there was no decreet against the Lady during the marriage, yet that the defender is liable *in quantum locupletior factus est* beyond what is necessary *ad sustinenda onera matrimonii* according to the quality of the person and the estate. And ordain the pursuer to condescend on the *lucrum* made by the defender, and the defender to condescend on the *onera matrimonii*, how far the defender's estate was burdened with that marriage, either by the Lady her liferent provision, or by provisions conceived in favours of the children to be procreated of that marriage; to be considered by the Lords at advising of the cause; and reserving to both parties to object *contra producenda*." Culross, in his Decis. *Jan.* 1583, *Allardice*, shows that the Lords, in a case like this, assoilyied *simpliciter*. *Vol. I. Page* 122.

1678, 1679, *and* 1680. ALEXANDER ARBUTHNOT of KNOX *against* MARGARET STRAITON, Lady KNOX.

See the prior part of this case, Dict. page 13,389.

1678. *December* 12.—ALEXANDER Arbuthnot of Knox his improbation against the Lady Knox (*vide* 6th Nov. 1678,) being called in the Inner-House, I deduced all the indirect articles of improbation against her bond; which I here omit, because they are to be found in the informations.

The Lords ordained Alexander to produce all adminicles and evidences by writ, or witnesses, or comparing hand-writs, for convelling the faith of said bond; as also allowed her to prove and astruct the said bond, and that it was produced in her husband's lifetime, and seen at Exchequer, and elsewhere, and by whom; and grant diligence to both parties for that effect.

Vol. I. Page 28.

1679. *January* 8.—The removing pursued by Margaret Straiton, Lady Knox, against A. Arbuthnot, (*vide* 12th Dec. 1678,) being again reported; the Lords found, that the consent adhibited by a lady-liferenter to a minute of a contract of marriage, not being repeated in the extended contract itself, does import that her consent was only to the marriage, and does not prejudge her of her liferent right. And find, that the lands in question, being purchased by the husband, during the marriage, to himself and his wife, in conjunct liferent, and to the longest liver, is not revokable as a donation *inter virum et uxorem*, in respect of the bond prior to the marriage, whereby he was obliged to infeft her in the conquest during the marriage: but reserve to their consideration, whether this bond itself may be annulled as *contra pactum dotale;* or may be revoked as granted after the marriage, because it is granted after the solemn settlements contained in the contract of marriage; to be determined at the advising of the reasons of reduction and improbation against the said bond: and supersede the determination in the removing till the 15th June next; betwixt and which time the defender, A. Arbuthnot, may insist in his improbation. *Vide infra*, 17th December 1679. *Vol. I. Page* 31.

1679. *December* 17.—The probation led betwixt Arbuthnot of Knox, and Lady Knox, (8th Jan. 1679,) being advised, the Lords, before answer, ordained trial to be taken by production of bonds, containing clauses of registration, before the English came to Scotland in 1650, running and conceived thus:—*To be registrate in the books of the Lords of Council and Session, or in the books of any other Judges.* For it was ALLEGED,—That style of judges' books was introduced by the English; and that formerly it run *in any other court-books;* and so there was a presumption of falsehood from that recent style, the bond bearing date in 1638. But, after trial, it was found there were clauses of registration conceived both the ways before the English usurpation.

I hear that the Lords improved a writ, because, by ocular inspection, betwixt and the light, it appeared that a sheet was taken out, and a new sheet put in with a mark and stamp on the paper, which was not in being when the said contract bore to be dated and subscribed. *Vol. I. Page* 69.

1680. *June* 18.—In the improbation pursued by Alexander Arbuthnot of Knox against the Lady, (12th Dec. 1678;) the Lords granted her a farther diligence for adducing witnesses to astruct the bond offered to be improven, al-

beit the cause this half year was so concluded as it was lying ready to be advised, and the persons against whom she craved her diligence were examined already; for *nunquam concluditur in causa falsi*. *Vide* 14*th July* 1680, *Robertson*; and 21*st July* 1680, thir parties. *Vol. I. Page* 102.

1680. *November* 30.—In Arbuthnot of Knox his improbation and reduction against the Lady; the Lords, contrary to what they did formerly, (8th Jan. 1679,) now find her consent to the minute of his contract of marriage is a homologation of Arbuthnot's right from Colonel Hary Barclay, in so far as concerned the fee of the lands disponed, but not *quoad* the liferent; as to which, they would not find she had prejudged herself.

The Lords declared this was not so much a decision *in jure*, as an advice and a trysting interlocutor; and they would appoint her liferent of the whole, in so far as exceeded her contract-matrimonial, should only commence at Whitsunday next; so that he should not be liable to her for bygones.

But neither being satisfied with this, see it fully decided at the 15th December. *Vol. I. Page* 119.

1680. *December* 15.—The improbation, Arbuthnot of Knox against the Lady, being finally advised this day, the Lords improved the bond *quoad omnes civiles effectus*, and ordained Mr Alexander Steven to be apprehended, (whom there is ground to suspect as the forger,) and other of his writs to be produced, that they may be compared with this bond.

The Lords went on the reasons of reduction, joined with the suspicions of falsehood; but, out of pity to the Lady, would not declare it false. *Vol. I. Page* 122.

See partial reports of this case in Morison, p. 13,389, 13,390, 6,761, 6,527, and 16,681, by Fountainhall and Stair.

1680. *December* 16. BURNET of CRAIGMYLE *against* BURNET of CRAIGOUR.

IN the action of maills and duties, Burnet of Craigmyle against Burnet of Craigour, an Act having been surreptitiously extracted without hearing all Craigour's defences; upon a bill given in by him craving the Act might be called back and cancelled, the Lords ordained Craigour to found what defences he had to propone farther than was already contained in the Act, that they might see if there was any just cause for rescinding the Act, and restoring against the same. *Vol. I. Page* 122.

1680. *December* 23. RENTON of LAMERTON *against* HOME of POLWART.

IN Renton of Lamerton's case against Home of Polwart, a seasine being quarrelled as null, because, in the act of tradition, instead of saying, "by delivery of earth and stone," it says, "by delivery of the ground of the lands," which is earth, but not stone; and that this is *de forma specifica*, and essential:

The Lords found the seasine, being *in re antiqua, viz.* thirty years ago, valid; but, if the notary was alive, ordained him to be deprived for his informality.

An infeftment of annualrent was quarrelled, because the seasine bore the delivery of a piece of silver money; whereas the symbol of it precisely is "a penny," *secundum veterum nostrorum prædecessorum paupertatem.* Yet I think the silver, as *majus, continebit sub se minus.*

The Lords, in January 1680, in the case of *Homer Maxwell of Kilbain* against *The E. of Nithsdale's Tenants*, sustained a seasine the attestation whereof was only the contracted subscription which a notary uses to put to any other inferior kind of instrument, such as the intimation of an assignation, or the like; *viz. ita esse attestor signo et subscriptione his meis manualibus.*

In another cause, they found a seasine valid, though it was registrate with the notary's name blank, *Et ego vero notarius publicus;* because the party condescended on him, and so filled it up *ex intervallo*, and abode at the truth of it. *Vol. I. Page* 122.

1680. *December* 23. THOMAS WILSON *against* WILLIAM BROWN.

IN Thomas Wilson's case with William Brown, (12th Nov. 1680, *supra*, p. 37,) the Lords declared they would not admit of qualified oaths when it was only an oath of calumny; because, there, other probation is admitted against it.
Vol. I. Page 123.

1680. *December* 23. HAMILTON of RAPLOCH, and JEAN LOCKHART his Spouse, *against* JOHN BONNAR.

IN James Bonnar's improbation against Hamilton of Raploch, and Jean Lockhart his Spouse, who was formerly wife to John Bonnar, the Lords found the bond produced by the said Jean, false, and improved it.

Nota.—Falsehood turning so bold and frequent, the Lady Knox's bond and this being two in one week, it should be more severely punished.
Vol. I. Page 123.

1680. *December* 23. DAVID FERNE *against* WILSON of CROGLEN.

IN David Ferne's cause against Wilson of Croglen, the Lords found the father liable to pay the debt contained in his umquhile son's bond,—the creditor proving that the cause of the bond was for aliment, and that the son staid at his house; and again found it relevant to assoilyie the father, *secundum S. C. Macedonianum*, that he offered to prove that he gave his son at that time a competent allowance, upon which he might have lived, or paid for his own aliment. *Vide 24th November* 1682, *Alston.* *Vol. I. Page* 123.

1680 *and* 1681. GEORGE HOME *against* SIR ALEXANDER and PATRICK HOME.

1680. *December* 14.—GEORGE Home, as donatar to the forfeiture of Home of Kello, his brother, pursuing Sir Alexander and Mr Patrick Homes, as representing Renton, their father, for a sum owing by him to the forfeited person:

ALLEGED,—Compensation against the King, (from whom the gift of forfeiture flowed,) upon a bond due by the King to their father. ANSWERED,—This did not meet the donatar. REPLIED,—It extinguished *pro tanto in ipso momento* that the forfeiture devolved to the King, he thereby becoming both debtor and creditor.

Newton took this to the Lords' answer. See 6th of Jan. 1681.

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1681. *January* 6.—The compensation proponed (14th Dec. 1680,) by Mr Patrick Home against the King, being reported, the Lords inclined to sustain the compensation, but evaded it upon another point, as not being proven by the King's letter produced, which acknowledged indeed the debt, but recommended to the Parliament to fall upon a way to pay it: and so, being limited by that special destination and method laid out by the King for payment of it, it could not compensate. *Vol. I. Page* 125.

1681. *January* 6.

IN an action for payment against a cautioner in a suspension, he alleged absolvitor; because, the principal not having subscribed the Act for his relief, he being only an accessory, *(qui sublato principali tollitur,)* he could not be tied.

The Lords found him obliged, seeing it was on his own peril that he did not look to his relief. Yet, *negotiorum gestorum actione*, he may seek it.

This, being a judicial enacting, differs from the case of a cautioner in a bond, anent whom it may be questioned, if he be obliged where the principal does not subscribe; for, though they be *correi debendi*, and each of them bound for the whole conjunctly and severally, yet it may be said to be only a renunciation of the *beneficium ordinis et discussionis* in order to ready access and execution against either, but not to be a renunciation of the pendency of the obligation itself, *in suspenso*, till the principal sign it. See 27th July 1671, and Haddington's Index, *voce* Caution, *n.* 10, where the cautioner is freed, the principal not subscribing; and Stair is of the same mind, *tit.* 8, *in fine.*

Vol. I. Page 125.

1681. *January* 8. GRANT of KIRKDALES *against* GORDON of BIRKENBURN.

A REDUCTION of a disposition by a father to a son, on the Act 1621, was this day advised. The Lords had, by the Act of Litiscontestation, sustained thir two defences against the reduction; 1*mo*, That the father was not a bankrupt, but had an estate *aliunde* in moveables, sufficient to pay the debt acclaimed,

beside the lands disponed to his son. *2do*, That the son had paid an adequate onerous price to his father's creditors; and, probation being led, both on the worth of the lands and the price paid, the Lords found the moveable estate proven was not equivalent, so as they might have satisfied the sums pursued for; and that the mains, never being set in tenantry, the rent of them was not clearly proven. Therefore ordained the defender to depone anent the true yearly sowing and holding of the mains, and either of them to adduce probation what a roum of that sowing might be set for in that part of the country, and that betwixt and the 16th of January next. And, *ex officio*, ordained the creditors to depone what sums the defender paid to them when he acquired their rights.

Against this he gave in a bill, ALLEGING, He ought to have allowance, in the computation of the whole sums which might have been exacted from his father; and that the clause in the 62d Act, Parl. 1661, making it redeemable from apparent heirs for the sums they gave, meets not here, especially seeing the said Acts, 1621 and 1661, are correctory; and he offers to depone the favours and eases he got were merely on his own account, and he never pactioned to give any benefit of it to his father. *Vol. I. Page* 125.

1681. *January* 11. JANET JACK *against* The MARQUIS of DOUGLAS.

JANET Jack having charged the Marquis of Douglas on his bond for 50,000 merks; he suspends, that it was granted *ob turpem adulterii causam*, and without all onerous causes.

The Lords ordained her to depone on the onerosity of the cause for which it was granted. Law says, *ubi utriusque versatur turpitudo potior est conditio possidentis*. But, upon a representation by the Marquis, who was unwilling that her oath should be taken on it, the Lords inclined to examine the witnesses in the bond what were the onerous causes thereof. *Vol. I. Page* 125.

1681. *January* 13. DOCTOR ROBERT TROTTER *against* THOMAS GARVIE.

DOCTOR Robert Trotter's action against Thomas Garvie being reported; the Lords, before answer, ordained Patrick Telfer, the pronouncer of the decreet-arbitral, to be examined, upon oath, what evidences were given to him that the discharges produced were different, or that Thomas Garvy did consent or acquiesce thereto. *Vol. I. Page* 126.

1681. *January* 13. SYME *against* BLACK.

IN a suspension, Syme against Black, the Lords reponed Syme against a decreet of spuilyie pronounced by the bailie of the regality of Lanerk, upon probation in absence; because, though he had *focum et larem* there, *viz.* his wife

living in Hamilton, yet himself was one of Claver's troop, and so was *absens* on the King's service; but they ordained the probation, led before the bailie, to be transmitted to this process, that they might re-advise it.

Vol. I. Page 126.

1681. *January* 13. HUNTER and HENDERSON *against* BROWN and JOHN RODGER.

THE cause, Hunter and Henderson against Brown and John Rodger, being reported, the Lords sustained the prorogation of the tack, and refused to restrict it to the sum in the first tack. But find the said prorogation is only to Marion Brown herself, without mentioning either her heirs or assignees; and that therefore her voluntary assignees can have no right thereto, but prejudice to the heirs of the said Marion Brown, to serve themselves in the right of the said tack, though they be not mentioned therein.

See the contrary decided in Dury, *ult. February* 1637, *Home.* See Culross's Practiques, in *June* 1579, *Little;* and 11*th November* 1609, *L. of Drum.*

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1681. *January* 14. KILPATRICK of CLOSEBURN *against* ———.

IN an action, Kilpatrick of Closeburn against ; an adjudger having compeared, and craved preference to one who had got a voluntary disposition of the lands for adequate onerous causes before the adjudication, and was infeft before the adjudger was infeft, upon this ground, That the disponer was not only his debtor, but was cited on the summons of adjudication before he granted the said disposition, and so he was *in mala fide* after that to make a fraudulent disposition:

ANSWERED,—The disposition was not in defraud, nor any ways quarrellable on the Act 1621; because *inter extraneos,* and for adequate causes, and he could not know that the disponer was cited in an adjudication.

REPLIED,—These adjudications coming in place of apprisings, as the denunciation of the apprising rendered it litigious, and impeded the debtor's voluntary deeds thereafter; so a citation, on a summons of adjudication, (which now corresponds to the old relative term of denunciation of the lands to be apprised,) ought to operate the same effect.

Forret gave them the Lords' answer on it. *Vol. I. Page* 126.

1681. *January* 20. The TRADES of BURNTISLAND *against* The MAGISTRATES.

THE debate between the Town and Trades of Burntisland decided. The Lords found the Magistrates not obliged to give the Trades seals of causes, or

to erect them into deaconries; but allowed the Magistrates yearly to name visitors or overseers for every trade, to be accountable to them; and appoint the Trades to make the third part of the Town-Council, *viz.* seven;—the merchants, maltmen, and seamen, making the other two parts.

The Trades were craving more. *Vol. I. Page* 126.

1678 *and* 1681. WILLIAM VEITCH *against* PETER PALLAT and THOMAS WILSON.

1678. *July* 24.—IN an improbation, pursued by Peter Pallat and Thomas Wilson, his factor, against William Veitch, for producing a gift of one Sanderson's escheat, granted to David Rodger in the time of the English usurpation, when the back-bond and conditions of the gift were inserted in the body thereof:

It was ALLEGED,—1*st*, That, being *in publica custodia*, it needed not be produced; but only condescend upon the date. ANSWERED,—That brocard held only where the principal was left at the Register, but not where they got the principal; and the Register only keeped a copy, as in seasines, reversions, hornings, gifts of escheat, &c.

2*do*, ALLEGED,—That, in a former debate betwixt the parties, it was produced in process, and the Act bears so, which is *probatio probata*, so that it needs not to be produced now. ANSWERED,—*Nullo modo relevat* to stop certification, if it be not produced now; else it were easy to steal up a false paper, after production, and thereby shun the improving thereof.

Yet it was informed, that, in a case between *Grant of Ballindalloch* and *Grant of Dalvey*, this same allegeance was sustained and found sufficient to stop certification. See Stair, 22*d January* 1662, *Earl of Marr*.

Vol. I. Page 10.

1681. *January* 20.—Veitch and Pallat's case was advised, and Veitch preferred, because Pallat's papers, adduced by him *in modum probationis* to instruct Sanderson had a visible estate, and that the bond was for anterior furnished wine, were amissing. But, being afterwards found, the Lords, on a bill given in by Thomas Wilson, Pallat's factor, stopped all till they had fully advised the probation. *Vol. I. Page* 126.

1681. *January* 22. DRUMMOND of CARLOWIE *against* SIR JOHN DALRYMPLE and GEORGE YOUNG.

See the prior part of this case, Dict. page 15,645.

IN the cause, Sir John Dalrymple and George Young, his assignee, (16th Nov. 1680,) the Lords found,—in vicarage-teinds, such as calves, lambs, &c. where they are fewer than ten and above five, because a half lamb cannot be paid *salva rei substantia*, and without destruction of the animal,—that the value

of the half *succedit loco rei* as *surrogatum*, and is due. See the same decision, Haddington, 19*th Jan.* 1611, *Baillie.*

Sir G. Lockhart contended it was downright nonsense, and contrary to law, to decern for the value, where *ipsa corpora sine rei interitu* could not be paid, and that nothing was due in that case at all. *Vol. I. Page* 127.

See other reports of this case, Dictionary, page 15,275.

1680 *and* 1681. Sir JOHN MAITLAND and LADY CUNNINGHAM *against* LORD and LADY CARDROSS.

1680. *June* 8.—SIR William Sharp, keeper of the Signet, demurring to sign a caption at Mr John Maitland and Lady Margaret Cunningham's instance, against Lady Cardross, for exhibition of papers in her hands, because she was clothed with a husband; and this being represented by a bill, the Lords found that could not exeme her, the horning not being for payment of money, but prestation of a deed; the fact of exhibiting being prestable by herself, and in her power; (she having the writs in her husband's absence forth of the country;) and so ought not to decline to obey what is just; and her contempt, delay, and refusal against authority was *quasi maleficium.* In which cases execution may pass against wives. *Vide 7th July*, 1680. *Vol. I. Page* 101.

July 7.—In Mr John Maitland's action against Lord and Lady Cardross, (June 8, 1680,) the Lords found, where there were two heirs-portioners, the child or descendant of the eldest daughter ought to have the custody of the papers and writs, albeit the Lady Cardross was in the possession, and that we say *in pari causa potior est ratio possidentis;* and appointed her only to get transumpts of them; and reserved to them to debate upon the tailyie.

This is no more than what had been decided before, Dury, 17*th July* 1638, *Denholme.*

The Lords further ordained the expenses of the transumpts to be equally divided betwixt the parties, seeing they had equal interest. But as to the tailyied lands, preferred Cardross as to the writs thereof; he always freeing Lady Margaret, conform to the tailyie, of her father and brother's debts.

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July 17.—In Mr John Maitland's general declarator of liferent escheat against Lord Cardross, (21st January last,) Cardross replying *incidenter* on his summons of improbation, which he had depending against the executions of the horning whereupon his escheat was gifted; they DUPLIED, That the execution of the summons of improbation was null, because it bore, some of the defenders were personally apprehended, and some at their dwelling-place; that others were cited at the market-cross of Edinburgh, and pier and shore of Leith, as being out of the kingdom; and was not special in naming and designing who were cited personally, and who at their dwelling-house, &c.; which precludes him from all means of improving the same.

ANSWERED,—It was sufficient to condescend immediately.

This being reported on the 23d July, the Lords found the execution null, and their amending of it, or giving in a formal execution under the messen-

ger's hand before reporting, and offering to abide at it as true, is not sufficient now to sustain the execution, which was once produced, informal and null.

This was judged very strict law. And on the 20th July, betwixt thir same parties, the Lords found no necessity of Mr John Maitland's enrolling in the Inner House; but having appointed it to be heard in presence, that they may call and hear it summarily when they please.

This punctilio, I remember, gave rise to Callender and Almond's appeal against Dumfermline in 1674. *Vol. I. Page* 108.

1680. *July* 23.—In Mr John Maitland's action against Cardross, (*vide* 17th instant,) the Lords repelled Cardross's allegeances founded upon the impetrating of the gift of escheat from his Majesty by obreption *expresso mendacio*, or subreption *celata veritate*; because it appeared that there was a competition made by Cardross before the gift was past in Exchequer, and this same objection was made against it, that it was impetrated *viis et modis*; whereon the Exchequer demurred till they wrote to his majesty to know what truth there might be therein; who, by a letter in answer thereto, assured them it was but an unjust clamour, and he disowned any obreption; whereupon the Exchequer past the gift. But some lawyers did not think the obreption sufficiently purged thus, *consulendo et referendo ad principem*, unless intimation had been duly made thereof to Cardross, to the effect he might be in readiness *etiam preces relationis refutatorias principi mittere, si ei videretur*, as the law prescribes, *ll.* 1 and 2, *C. de Relation.*; which fair method was not used here; so that the very consulting the Prince was part of the tract of the obreption. *2do*, It was ALLEGED for Cardross, the denunciation of the horning was null, because it is not at the market-cross where the lands lie, but only where he dwelt. ANSWERED,—That was sufficient to make his escheat fall, as hath been often decided.

The Lords found the tailyied lands, in respect of the conception of the clause of tailyie, behoved only to pay Sir James Stewart of Kirkhill's debt, and that without any recourse or relief against the heir of line, or the executry goods; and so that the heir of line was not liable therefore. Albeit in common law the heir of line and the moveables ought to be discussed before the heir of tailyie.

And they found there could be no *confusio debiti et crediti* in the person of Sir William Stewart the Lady Cardross's brother, (as Cardross alleged,) though he was the same person that was both heir of line and heir of tailyie; but found the existence of the obligement of the clause of tailyie only began when the succession came to divide in two streams and branches, and when the heir of line, Lady Margaret Cunningham, by representing her mother, becomes *diversa persona* from the heir of tailyie, the Lady Cardross, as it now is.

When this cause was voted, there were six of the Lords *non liquet, viz.* the Lord Register, Newbyth, Harcous, Pitmedden, Haddo, and ——; and so the decision of it was delayed for that day: for, by a custom among the Lords, if there be more *non liquets* than one, they can proceed no further that day, nor determine the cause till the next, that some of those *non liquets* may get leisure to clear themselves.

The next day, being 24th July, they resumed the votes, and the six who were *non liquet* yesterday voted all *negative* against Halton's son, and obtested

God that they followed nothing but their own conscience in it. Though some drew a deeper plot of a schism in the bench from it. There were six Ordinaries voted for Mr Maitland; and Athol's extraordinary vote being also for him, that carried it, and made it seven to six. There was in this cause a declinature given against Newton, as he who had solicited and given partial advice to Halton; but being only subscribed by the Lady Cardross, it was rejected. *Vol. I. Page* 109.

1680. *December* 14.—Sir John Maitland's cause against Cardross and his Lady, (*vide* 17th July 1680,) being advised by the Lords, is decided in Sir John Maitland's favours. *Vol. I. Page* 122.

1681. *January* 22.—In Sir John Maitland's action against Cardross, (14th Dec. 1680,) the Lords inclined to sustain an execution of a summons, though null, as wanting witnesses; because, in fortification thereof, it was offered to be proven, by the parties' oath, that a copy was given them. Though it was alleged executions are only probable *scripto, et non partis juramento.*

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See the concluding part of the report of this case, Dictionary, page 5,523.—See reports of this case, Dictionary, pages 5,522, 12,493, 16,095, 2,449, and 3,038.

1681. *January* 29. GRAY *against* BROWN and OTHERS.

THE Lords refused to extend their late Act of Sederunt, anent what diligence executors-creditors should be liable for, to any cases before the date of that Act; yet, if the Act be perused, it will seem to have a retrospect. But that may be applied to one clause of it, but not to all. *Vol. I. Page* 128.

1681. *February* 3. GILCHRIST *against* ADAM CUNNINGHAM, Macer.

LORD Newbyth found a Scotsman, though out of the kingdom, following his trade, might pursue actions without a factory or mandate to another, seeing he was not absent *animo remanendi,* and factories were only necessary in case of strangers, or Scotchmen absent *animo morandi extra regnum.*

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1681. *February* 3. THOMAS HENDERSON *against* WILLIAM CLARK'S TENANTS.

THOMAS Henderson's action for maills and duties upon an adjudication against William Clark's tenants. Newbyth found an assignation to the maills and duties by Mr William to Mr John Elies for relief of cautionry, though intimated before Henderson's adjudication; yet the said assignation could not compete with his adjudication for terms after the decreet of adjudication, the

assignation not being a real, but only a personal right, and so could last no longer than Mr William Clark had it; and not after he was denuded by a real diligence. *Vol. I. Page* 128.

1681. *February* 4. JOHN COUPER *against* JANET MACGILL.

IN John Couper's action against Janet Macgill; Newbyth found the executions of the charge to enter heir, and of the summons raised thereon, null, because they were executed before year and day was expired after her goodsire's death; and, though it was more than a year since her father's death, yet she being *posthuma*, and it not being a year since her birth, he found the *annus deliberandi* ran *a tempore partus tantum*, and not from her father's death.
Vol. I. Page 128.

1681. *February* 5. The EARL of NITHSDALE *against* His VASSALS of HALIEWOOD.

EARL of Nithsdale against his vassals of the abbacy of Haliewood, [*de sacro bosco.*] In this reduction and improbation, the defenders refused to take a term, because the Earl's predecessor being one of them, who, in 1633, and before, had surrendered to the King the superiorities of their church-lands, the Earl thereby ceased to be superior; and so, in a former pursuit, the Lords found they were not obliged to produce to him, but turned his reduction and improbation into an exhibition, that he, as Lord of erection, might see their writs, to the effect he might know what were the feu-duties they paid, to which he had right.

But the Earl REPLYING, That several of the vassals, since the year 1633, had taken charters to be holden of him, (which is lawful for them to do,) and so he had returned to the superiority, Lord Newbyth found all such were obliged to take a term in the reduction and improbation, to produce their evidents since 1633; and, *quoad* their writs before that, sustained only the summons to have the effect of an exhibition. *Vol. I. Page* 128.

1681. *February* 5. JAMES ELIES of SOUTHSIDE *against* JOHN BROWN of GEORGIE-MILL.

IN James Elies of Southside his reduction and improbation against John Brown of Georgie-mill, the Lords, on a bill, found the pursuer must, *in initio litis*, instruct a progress from these persons, granters of the writs which were called for in the improbation *active*. As likewise they find, that the representatives of these persons, who are named in the summons as authors to the defenders, must be called *passive in initio litis* if they be known; but, if they be

not known, it is sufficient (when they are condescended on by the defenders,) that the pursuer call them *cum processu.* And find, that the pursuer must instruct the factory, (whereby the granters of the precept of *clare constat*, whereupon the pursuer's title is founded, are appointed trustees for the rest of the creditors;) and that *cum processu.* *Vol. I. Page* 128.

1681. ADAM CUNNINGHAM, Macer, *against* His CREDITORS.

January 14.—ON a petition given in by Adam Cunningham, macer; the Lords loosed arrestments laid on against him, by virtue of registrate bonds and decreets, because they were standing suspended, though, *regulariter* and without a suspension, such arrestments are not loosable upon caution; but superseded to determine whether his casual salary of his share of the half crowns due to him for decreets, &c. as one of the macers, was of the nature of an aliment, or might be subject to arrestments; seeing, by the Act of Sederunt, 27th February 1662, the Lords' salaries are declared not arrestable, and their privileges as *corpus aggregatum* communicatively are derived to all the members, and to their servants who attend them, though only the Lords be expressed in the Act; and Bronchorstius, *ad l.* 68, *D. de R. I.* says, privileges granted to a College and University *extenduntur etiam ad eorum nuntios et bedellos.* See this decided 9th February 1681. *Vol. I. Page* 126.

February 9.—The case between Adam Cunningham and his creditors, arresters, (14th January 1681,) being reported, the Lords found the macers' dues arrestable, and allow and appoint the keeper of the minute-book (who collects their half crowns for acts and decreets,) to count with the macers three times a-year, *viz.* the 1st of January, the 1st of March, and the 1st of August; and that the said keeper shall not be obliged to depone what is in his hands betwixt terms; but the arrester, according to his diligence, shall be preferred for the current term. *Vol. I. Page* 129.

1681. *February* 10. DOCTOR FRASER *against* BURNET of LEYES.

THE Lords, upon the Register's report, find that Leyes, the defender, is obliged to exhibit all discharges granted by the legatars which the defender has, or had since the citation, to the effect it may appear these sums were satisfied, or secured, conform to the destination of Doctor Reid's testament: And admit the libel of declarator to the pursuer's probation as to the bond of £200 sterling, that it is for the same cause that the prior bond of £300 sterling was granted; and, in order thereto, appoint the defender to depone if he has the bond of £300 sterling, or had the same since the citation, or has at any time fraudulently put it away. And, in case he deny the having, and the rest, grant commission to Mr Andrew Forrester at London, to take the oath of ——— Barkhame, in whose hands the said bond is alleged to be, anent his having of the same; and he acknowledging it, that Mr Forrester take inspection of the bond, and return, with the report of the oath, a just copy under his hand of the bond, and

of the receipt of £100 sterling, alleged by Sir Alexander Fraser to be upon the back of it. *Vol. I. Page* 129.

1681. *February* 11. JAMES ALEXANDER of KINGLASSIE *against* ———.

CASTLEHILL found the messenger's execution on the summons null; because, though it bore "my stamp is affixed," yet there was no stamp appearing there though recently done; and he affirmed the Lords had done the like ofttimes. I think the want of the stamp a nullity in executions of diligence, such as hornings, inhibitions, denunciations of apprisings, &c. but in citations on summons it is *juris strictissimi* to make it a nullity. However, Mr James took up his execution, and offered to make the messenger affix his stamp against the next day, and to abide at it.

Yet in Cardross's case against Sir John Maitland, (22d January 1681,) the Lords refused to allow the messenger to amend it, not being so *ab initio*. See Culross's Pract. in 1579, *Sinclair*. *Vol. I. Page* 129.

1681. *February* 15. KATHARINE MITCHELL *against* The CHILDREN of THOMAS LITTLEJOHN.

See the prior parts of this case *supra*, page

The Lords having considered the bill given in by the children of Thomas Littlejohn, and that certification being made in the Outer-house none objected why the desire of it should not be granted; therefore they ordain any party concerned, to give in a list to-morrow, to the Lords, of such persons as they would have to be curators to the minors, out of which the Lords declare they will authorise one to be curator *ad hoc particulare negotium, viz.* to uplift 2500 merks from the debtors, and give a discharge thereof; which sum they are to give to Katharine Mitchell, their father's relict, for her liferent right of 600 merks *per annum*, which was no prejudice to the minors, there being almost as much of bygones then owing her; but they were not bound to give her money, but only to assign to a third of the moveable estate. *Vide* 10th July 1678.

This is also done where minors have lands to set, and none (for fear of gestion as tutors,) dare meddle for them, and subscribe the tacks with the tenant; the Lords will authorise one for that effect, and it will bind nothing on him; which is also great advantage to minors wanting tutors or curators. *Vide* 17*th January* 1683, *E. of Leven*. *Vol. I. Page* 130.

For the numerous other reports of this case, see the Index to the Decisions.

1676 *and* 1681. WILLIAM WOOD and WILLIAM SHANKS *against* ALEXANDER MURDOCH.

1676. *December* 12.—ALEXANDER Murdoch having bought a tenement in

Kirkcaldy from William Wood and William Shanks, as apparent heirs to Alexander Law, their good-sire, they enter in a contract, by which they sell the tenement, and oblige themselves betwixt and a day to enter themselves heirs, and be infeft and complete the security; and Murdoch obliges himself to pay the price. Murdoch, being charged on this, suspends, 1*mo*, That they have not perfyted the right, nor cannot make him a good and uncontroverted progress, being minors.

ANSWERED,—They opponed their service, retour, and infeftment, with their grandfather's seasine, &c. and their curators should consent.

REPLIED,—The service did not prove the blood, &c.

DUPLIED,—It was a decreet, and probative so long as it stood unreduced.

The Lord Forret found this sufficient.

Their second reason was, That, since the contract, the house sold was damnified by an accidental fire had happened in the neighbourhood.

ANSWERED,—*Post venditionem, licet nondum facta fuerit traditio, damnum fatale et casus fortuiti ad emptorem spectant;*—§ 3*tia, Institut. de Emptione, Venditione.*

Forret repelled this; and Stairs, *tit.* 10, Of Conventional Obligations, § —, speaking of Sale, thinks such chances follow the seller till tradition.

2*do*, ANSWERED,—Offered to prove the house was in as good case as when it was sold.

Forret, before answer, ordained a visitation to be directed to the bailies of Kirkcaldy, to take inspection of the house, and to try in what case it was the time of the sale, and how much it is now deteriorated, to the effect they may consider the damage.—It had been easier to have offered to deduct off the first end of the price whatever damage should be found; especially considering the house was ruinous the time of the contract, and his design in buying it was to throw it down and rebuild it, though now he would be rid of the bargain. See the information. *Vide supra, num.* 503, 8*th November* 1676, *Moodie, Somervell,* and *Gilchryst.*

What if a stirling or pyot should have pulled out some straws, to build her nest with? *Advocates' MS. No.* 519, *folio* 269.

1681. *February* 15.—In the cause Wood and Shanks against Murdoch, (12th Dec. 1676,) the Lords, on Forret's report, in regard the progress produced is not from Alexander Law, in the terms of the minute of sale, which, being special, ought to be performed *in forma specifica*, and not *per æquipollens*, but from Davidson; find the bargain to be dissolved, and that the other party is free; and therefore suspend the letters *simpliciter hinc inde*, at either party's instance, against others, upon the said minute.

Yet one would think the giving them both a progress from Law, and Davidson's right likewise, is more than condition; which should not annul the minute, having no irritant clause. Only, it was answered, Law's right was merely of an annualrent, whereas, if the property had flowed from him, they would have relied on his warrandice; but Davidson has none to represent him. But this last could not import, for Alexander Law hath as few. *Vide* 8*th July* 1671, *Pitrichy;* and 23*d June* 1681, *Forbes.* *Vol. I. Page* 130.

1681. *February* 17. STEWART *against* —— ——.

IN the case of one Stewart and —— ——, the Lords ordained this point to be further heard in the Inner-House: Where forty years' prescription is objected against a comprising, and this interruption is condescended on, that, after the comprising, there was arrestment used on the letters of horning, and an inhibition served. ANSWERED,—All this was only done by virtue of the personal obligement in the bond to pay, and was noways relative to the comprising, nor done upon it. For it was doubted if this was a sufficient interruption.

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1681. *February* 17. GRAY of SKIBO *against* COLIN ROBERTSON of KINDIES.

See the prior parts of the report of this case *supra*, page 268; and Dictionary, page 6763.

IN Colin Robertson's and Skibo's affair, (14th July 1680,) the Lords finding one of the witnesses was, by deforcement, rescued from the messenger, and the other put out of the way, they renewed the commission for reëxamining them; though they had already clearly, upon oath, once improven the bond, and denied their subscriptions; because there was ground to think of them, (as of Broughton's instrumentary witnesses,) that they had prevaricated.

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1681. *February* 23. The DAUGHTERS of JAMES HAMILTON of MONKTONHALL *against* —— HAMILTON, Lady Sauchtonhall, and JAMES BAIRD, her Husband.

THE daughters of James Hamilton of Monktonhall pursue their eldest sister, the Lady Sauchtonhall, and James Baird, her husband, by a declarator that the estate was devolved to them; because their father, by a clause irritant in his disposition, had provided, if she married without the consent of the friends he nominated, she should lose his estate. *Ita est*, she did not require their consent.

This being reported to the Lords, they found the declarator relevant, and the irritancy incurred, the pursuers always proving that it was intimated and made known to her before her marriage.

I think, albeit she was bound to ask their consent, yet she would not have been obliged to have followed it. *Vide* 13*th February* 1680, *Buchanan.*

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1681. *February* 28. The COLLEGE of EDINBURGH *against* SIR ROBERT HEPBURN.

THE College of Edinburgh having charged Sir Robert Hepburn of Keith, and other heritors of Humbie parish, upon the Act of Privy Council, for their vacant stipend; the Lords, on report, found the patron *jure communi* had right,

sede vacante, to the stipend since the expiring of the Act of Parliament 1672, given them for seven years to the Universities; and preferred Sir Robert as patron to the College; notwithstanding of the Act of Privy Council prorogating the Act of Parliament and giving them the vacant stipends. Which was to make an interfering of jurisdictions, and cause the Session annul summarily Acts of Privy Council. Only some of the Lords of Session are patrons of churches, and they looked on the Act of Privy Council as *parte non citatâ nec auditâ*, and null, unless the several patrons had given their assent thereto. And the 115th Act Parliament 1592, and first Act 1612, give the patron the fruits, if he present a qualified person, and he be refused; and though the Parliament may prejudge patrons (where their consent is also tacitly implied,) yet the Privy council cannot. By the canon law, the patron had the fruits *sede vacante*, but not for his own private use, except he fell poor; but he behoved to apply them to a public or pious use. Craig says, *Fructus, vacante sede, hodie apud nos ad principem aliumve patronum pertinent, quòrum rationem reddere non tenentur.*

By the old canons, the vacant fruits were divided into three, *viz.* to the next entrant succeeding; the fabric of the church; and the poor. The Pope after this assumed the disposal of them; in whose place our king succeeds by the Act of Annexation 1587, though teinds be not there annexed.

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1681. *February* 23. The Lady Aberlady and Hugh Kennedy her Husband *against* Fletcher of Aberlady.

The Lady Aberlady and Hugh Kennedy late of Ardmillan her husband against Fletcher now of Aberlady.—The debate, if her annuity of 2500 merks ought to bear a proportional part of the public burdens, being reported, the Lords found the minor's father Sir Andrew Fletcher having been in possession and use of payment of said annuity without burdens, the chargers must be free for bygones; which likewise they declare shall free the tutors and curators. And sustain the allegeance that Aberlady, this minor's father, retained a stock of which he paid no annualrent, nor is to pay till the decease of the Lady, to liberate her from the burdens in time coming; and find the answer relevant, that the stock foresaid was affected with debts due by Mr John Hay of Aberlady, the disponer, and the charger's first husband. See Nov. 1673, [page 33,] where the annuity was granted with absolute warrandice; but this alone was repelled as not sufficient to free her against public burdens, seeing she was infeft on it.

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1681. *February* 23. Lady Idington *against* William Kirkwood.

Lady Idington having charged William Kirkwood in Dumbar, on his tack, for payment of the tack-duty; and he suspending on this reason, That he had paid it to Doctor Stevenson and Mr Robert Ker, who had infeftments forth of the lands set to him in tack;—the Lords, on report, found that the tenant ought

to have retention of what he paid to persons who had poindings of the ground whereof he was tenant. So that a naked infeftment of annualrent, without a decreet of poinding, was no sufficient warrant to him at his own hand to dispose upon the master's rent, who was able to pay his own debt. *Vide* Haddington, *4th June* 1611, *Hamilton*. *Vol. I. Page* 132.

1681. *February 25.* WILLIAM EWING, Vintner, *against* GRISSEL MALLOCH his Servant.

THE probation between William Ewing, messenger and vintner, and Grissel Malloch, once his servant taverner, being advised; the Lords found, by the oaths of the witnesses, that the said Grissel's reason of suspension and reduction was not proven, *viz.*:—That the bond charged upon was extorted by unjust or illegal force or fear.

Yet it was proven, that Ewing's wife, her mistress, did hold her in within the house, and threatened to send for an officer to put her in the tolbooth, if she would not subscribe the said bond; only, they had counted and reckoned before, and the Lords thought this a *metus licitus* to get a bond for the balance ere she deserted the service; likeas the threats were only *verba jactantia*, and were not put in execution. Yet less dread will serve to a woman than to a man, and to a minor than to one who is come to age.

But the Lords found the other reason proven, *viz.* that the suspender, at the time of granting the bond, was minor, and therefore sustained the bond only in so far as the account for which it was granted can be instructed.—This is very hard; because the servant who takes in all the money as the price of the wines is minor, therefore she shall be reponed without instructing lesion; only it may be said, vintners should not commit this trust to minors, as being a consequential breach of the *Senatus-Consultum Macedonianum*, intrusting your persons with money which they may prodigally waste. But they should count weekly with their servants.

Then ALLEGED, for William Ewing,—Though the suspender, as minor, could not be liable by the bond, yet the same was valid and obligatory against the cautioner, who, in law, had not the benefit of the principal's minority.

The Lords found the cautioner in the bond charged on liable, albeit the minor be not obliged thereby; and find the letters orderly proceeded against the cautioner; reserving action against the minor, on the account and grounds of debt whereupon the bond charged for is founded, as accords of the law.

Nota.—The cautioner is only in her bond of lawty and fidelity, but not in the bond for the liquid sum charged on. See Dury, *28th Nov.* 1623, *Shaw*. *Vol. I. Page* 132.

1681. *February 25.* DEBATES before the COMMISSION for PLANTATION of KIRKS.

AT the Commission for Plantation of Kirks, it was debated, 1*mo*, If they could grant protection to witnesses under caption to come and depone, seeing,

in the Act 1663, Against Protections, that court is not mentioned. Yet I think they may, for they are a sovereign court, and a committee of Parliament, and it is inherent in every judicatory to have a power to explicate their own jurisdiction, and make it effectual.—*2do*, It was debated,—seeing the Act 1672 requires two officers of state, two prelates, two barons, &c. to be a *quorum*,—if there be three officers of state present, and but one baron, if one of the officers of state may be computed a baron, (being likewise of that rank and degree, though not so named in the Act of Parliament,) to make up and supply a *quorum*.—*3tio*, A disposition to lands and teinds has been sustained in that court as sufficient to pursue a valuation of teinds, they producing a seasine *cum processu*. But I speaking with the King's advocate anent this custom, he condemned it as illegal, seeing a real right should be produced *in initio, ad fundandam litem* for valuing of teinds. *Vol. I. Page* 133.

1681. *February* 26. RIDDEL of HAINING *against* ELLIOT.

THE case of Riddel of Haining and Elliot was much agitated. One accused of theft had found caution, under the pain of 5,000 merks, to answer at the court kept by the Commissioners of the Borders; and he not appearing, and thereupon they having found by their decreet that the bond was forfeited:—of this decreet there was a suspension passed by the Lords of Session. Whereupon a complaint was given in to the Lords of Privy Council by the Commissioners of the Borders, that their commission, flowing upon the broad seals of both kingdoms, conform to the 2d Act, Parl. 1612, they were not accountable to the Scotch Council.

The Lords of Council found not themselves judges competent to the decreets of these Commissioners, but found their determinations ultimate, and not to be revised by any but by his Majesty and the Parliaments of the two nations.

Then, against the Lords of Session, it was ALLEGED, for the Commissioners, That the matter was no ways civil but criminal, and so fell not within the compass of the Session's cognizance.

The President and other Lords, waving that question anent the interfering of jurisdictions, found the letters orderly proceeded in Haining's favours, and repelled the reasons of suspension. Which was tacitly to assume a power of judging these decreets. See *3d October* 1677, *Rutherford*. *Vol. I. Page* 134.

1681. The POOR of the WEST KIRK, or St Cuthbert's, *against* JANET WILLIAMSON.

February 22.—THE Poor of the West Kirk parish against Janet Williamson being heard in presence; the Lords found the discharge of the same date with the bond, declaring the sum in that bond was the Poor's money, (though it was blank in the creditor's name,) to be of the nature of a back-bond, and so *pars obligationis*; and therefore preferred the Poor (Mr James Elies, their treasurer's name, being now filled up therein,) to the said Janet, the arrester for Alexander Sked's debt: to which Alexander the said bond was delivered blank; and he, being then treasurer to the said Poor, and their debtor, filled up the name

of his successor in office: except the said arrester offers to prove, by the witnesses inserted, that the discharge is antedated: in which case they allow her diligence for citing the witnesses to the 26th of February next. See thir parties at that day. *Vol. I. Page* 130.

February 26.—The Poor of the Parish of St Cuthbert's against Janet Williamson, (22d Feb. 1681.) The Lords, having considered the deposition of one of the witnesses in the discharge, denying it to be a true date, find the same cannot improve it, (yet it may render it null,) if the other witnesses do approve; and therefore ordain the other witnesses to be cited and examined; and allow both parties the indirect manner for improving or approving of the same, providing Mr James Elies, betwixt and Wednesday next, compear and abide by the said discharge produced and used by him; in which case they ordain the said Janet, the improver, to consign £30 Scots in the clerk's hands; and if, before the said time, the said James Elies do not abide by it, then they prefer the petitioner, Janet Williamson, and ordain her decreet to be extracted; and allow Mr James to protest in his abiding, that it is only as kirk-treasurer, &c.; or otherwise, as he thinks fit. *Vol. I. Page* 134.

See 12*th December* 1679, *Robertson* against *Robertson;* 15*th July* 1681, *Comblin* against *Corby;* and 9*th December* 1681, *Nisbet* against *Westkirk*, the continuation of this case.

1681. *March* 4. Robert Miln *against* Sir Patrick Home.

Robert Miln, tacksman, &c. against Sir Patrick Home of Polwart for customs, &c. Alleged,—He exported and imported nothing but for his own use; and whatsoever is so done by noblemen and gentlemen is exemed from paying of custom by express law; Act 152, Parl. 1592, Act 251, Parl. 1597, and the other laws and authors there cited. Answered, I.—This Act does not liberate from Excise, which is a tax and burden invented and imposed since these Acts, and the exemption is not repeated in the Acts anent Excise. II. The Parliament's grant of the customs to the King in 1661 has innovated this; and there is no reservation in favours of gentlemen. III. No other import is exemed from customs but what is the product and immediate return of our own exported commodities; which this was not. Replied,—It is enough that it is not rescinded nor taken away.

This touches the gentry in their copyholds and ancient privileges.—It was continued. *Vol. I. Page* 135.

1681. *June* 3. Patrick Gardiner *against* The Lady Torwoodhead and William Baillie, her Son.

The Lords, having heard Newton report the debate, found the inhibition against James Lord Forrester could take no effect against the infeftment of wadset, though posterior, granted by him to William Baillie of Torwoodhead, his brother, if the granter thereof was obliged to give an infeftment either of wadset or of annualrent, (though this last seems not to be a specific implement of the anterior obligement,) and that either personally himself, or as representing

the person obliged; and find that James Lord Forrester, the person inhibited, being bound, in William Baillie of Torwoodhead's contract of marriage, as consenter, to infeft the said William, the following disposition, albeit by way of wadset, is no voluntary deed, but an implement of the obligement in the said contract of marriage, wherein the said Forrester is a consenter.

This was complained upon by some; because, by the common principles of law, and current of decisions, infeftments are only drawn back to anterior obligements, in prejudice of intervening inhibitions, where the anterior obligement is express and specific for granting of that individual right quarrelled, bearing a precept of seasine; else any prior ground of debt were sufficient to secure voluntary infeftments against intermediate inhibitions, which would certainly evacuate all such legal diligences; and renders creditors who inhibited most unsecure, who are not obliged to know prior latent personal obligements. But here there is no necessary antecedent specific obligement to grant a wadset, and so no connexion betwixt the two, as law requires.

Yet this was repelled. See *30th November* 1681, *Carnegie*. *Vol. I. Page* 139.

1681. *June* 4. The VISCOUNT of ARBUTHNOT *against* ALLARDICE of that ilk.

THE Viscount of Arbuthnot pursues a reduction, against Allardice of that ilk, of a pretended tack alleged subscribed by the Viscount's father, on this reason, That, wanting a writer's name and witnesses, it was presumed to have been subscribed *in lecto*, at which time he could not prejudge his heir. Allardice, for his defence, repeated a declarator he had intented against the Viscount, to hear and see it found and declared that it was holograph, and his father's hand-writ, and was delivered, read, and seen, by famous persons, in the Viscount his father's lifetime; and therefore that he, as heir, may be decerned to extend the said minute of tack.

The declarator and defence being admitted to their probation, and it being this day advised, they took the Viscount's oath of calumny, if he had just reason to deny that it was his father's hand-writ; and he declaring that he could not tell, the Lords allowed them to the 10th of July next for proving, *comparatione literarum*, it was the late Arbuthnot's hand-writ, as also by witnesses who saw it in Allardice's custody before the late Arbuthnot's death; for, *esto* it were holograph, the difficulty still remains, unless it be proven that it was read and seen in the writer and granter's lifetime.

This farther term of probation the Lords indulged them, because they complained they were cut short of insisting in their own declarator, by engrossing it, by way of defence, into the Viscount's reduction. But they had prevailed with the clerk, and obtained an act for proving on their own summons, which induced the Lords to prorogate the time of leading probation to the 10th of July next.

Another reason of the Viscount's reduction was, that the tack is null, being without an ish. ANSWERED,—It bore these words, "to endure as long as Allardice pleased, he paying two bolls of tack-duty yearly;" which gave him the

nomination of the endurance; and he craved it might last for 500 years to come.

The Lords declared, if Allardice proved the other points, they would determine it to last nineteen times 19 years, which was as long an endurance as ever any tack used to continue in Scotland; but the Lords sustained themselves as having power to determine the endurance, without any debate. So that it may be reconsidered; for it may be debated, if a tack, having no other ish but as long as the tacksman pleases, be valid, and if the Lords, as *boni viri*, may determine the duration thereof.

Sir George Lockhart affirmed, that it was a vulgar error to say, that a holograph writ was presumed to be on death-bed, and so ought not to prejudge the heir; for he was clear a holograph writ ought to militate against the heir of the subscriber, unless, by other adminicles and documents, they instruct that it was subscribed when he was sick and on death-bed. Yet the common received practick seems contrary. *Vol. I. Page* 140.

1681. *June* 7. The KING'S TRUMPETERS *against* ANDREW WOOD, Bishop of Caithness.

THE King's Trumpeters against Mr Andrew Wood, Bishop of Caithness, for payment of 100 merks due to them for his patent of honour as a Bishop.

ALLEGED,—By the Act of Parliament, in favours of the Lyon and his heralds in 1672, there is nothing payable by the bishops to the trumpeters; and, if any have formerly paid, it was *meræ facultatis*, and a gratuity, and no ways a debt.

The Lords found there was no law for it; but found it relevant for the trumpeters to prove that they are in use and custom of getting that sum from every bishop at his inauguration. But, if they found the quantity to vary, then the Lords inclined to look upon it as a mere voluntary donation and a free gratuity. *Vol. I. Page* 141.

1681. *June* 10. ANENT POINDING of PLOUGH-GOODS.

IN an action, reported by Newton, the Lords found the poinding of plough goods a spuilyie, though it was offered to be proven that they had not been actually yoked in the plough for that year; seeing it was made appear to the Lords that it was done in labouring time, which is all that the 98th Act, Parl. 1503, requires. *Vol. I. Page* 141.

1681. *June* 16. Reverend Andrew Urie *against* James Nairn.

In the case of Mr Andrew Urie, minister at Morningside, against James Nairn in St Andrew's, the Lords, upon Haddo's report, admitted Mr Andrew to reply upon the Act of Parl. 1621, against a fraudulent disposition made by Nairn's father to him, being then his second son; and ordained Nairn to condescend on the onerous causes thereof; and would not (as commonly they require,) put him to a reduction on that Act; and this because it was *in re parvi momenti*, and fell *incidenter* only into this process on the passive titles, and was a transaction *inter patrem et filium*. *Vol. I. Page* 142.

1681. *June* 16. The Commissioners of Excise in Fife *against* The Creditors of Sir Alexander Bruce of Broomhall.

The Commissioners of the King's Excise, in Fife, against the Creditors of Sir Alexander Bruce of Broomhall, who, for several years, had collected the said Excise; for, by the law of the kingdom, failing the Collectors, the gentlemen who, by the 14th Act of Parliament 1661, are appointed to uplift it in every shire, their estates are hypothecated and liable for the same *in subsidium*.

The debate was a competition of preference betwixt the said Commissioners and Broomhall's creditors, as to the right of his estate. The King's tacit hypothec in the goods of all those that uplift his revenue, making him preferable to all other creditors, was urged for the Commissioners; likeas, it could be made appear that Bromhall with the public money paid his own debts.

It was alleged for the creditors,—That they had real rights upon his lands, perfected with all the solemnities required by the laws of the kingdom; which behoved to be a security to them.——As to such creditors whose debts were contracted, or real rights perfected, after his intromission with the King's money, and his collection, they were judged to be in a less favourable case than the anterior ones. See, of the regal hypothec, *Peregrinus de Jure Fisci*.

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1678, 1679, 1680, *and* 1681. David Jack *against* Claud Muirhead.

1678. *February* 14.—David Jack pursues reduction of a comprising led against him, as lawfully charged to enter heir to his father, and of the grounds of it against Clerk and Muirheads. The 1*st* reason of reduction was, One of the bonds was null, because subscribed by two notaries before three witnesses only: the Lords repelled this, because there were four inserted and designed in the body. 2*do*, That, in the decreet *cognitionis causa*, the procurator's name was blank: this the Lords regarded not. 3*tio*, That the charge to enter was wrong signeted: this they also rejected. 4*to*, That a sheet in the executions and another in the comprising were cutted and falsified.

Before answer to this, the Lords ordained John Hamilton, writer of the apprising, to be examined. *Vide 12th December* 1678, in another MS. thir same parties. *Advocates' MS. No.* 726, *folio* 320.

1678. *December* 12.—John Hamilton, the writer of the apprising, being examined, and having, in some measure, confessed the cutting and altering of the two sheets, the one in the execution and the other in the apprising, in respect a wrong market-cross was inserted; the Lords first inclined to restrict the comprising to the precise sum for which it was led, cutting off penalties and sheriff-fees, and to make it redeemable, though the legal was expired; but, the parties not agreeing on that, the Lords, upon ocular inspection and John Hamilton's declaration, reduced the said comprising *funditus.*

I hear of a case betwixt Janet Gall and the E. of Weymss in 1675, wherein the Lords, upon naked inspection of the writ, and upon comparing it with other hand-writs of the party, found it false and null; but declared that her bypast using of it should not import any corporal punishment or infamy against her, as producer and user.

Thereafter Jack gave in a bill, craving that Muirhead might account to him for his intromissions.

The Lords, in regard it was represented that they were *fructus bona fide consumpti*, on the 8th of Feb. 1679, adhered to their former sentence; and reserved action to Jack against Muirhead and the other representatives of Muirhead's father, for the intromission with the maills and duties had by them, more than will satisfy the debts for which the comprising was led. *Vide infra*, *19th Feb.* 1679; *item* 31*st Jan.* 1679, *Irvine*; 1*st Feb.* 1679, *Seton.*

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1679. *February* 19.—In Jack and Muirhead's case, (12th Dec. 1678,) it was debated, if an apparent heir be served, but warn parties to remove before he is infeft as heir, but infefts himself before the term to which he has warned them, if it be sufficient to validate the warning, and if it will accresce. Some distinguished, if it was on a retour, it was sufficient; but not if it was on a precept of *clare constat*, as in this case of Jack. And thus the Lords positively found, that a seasine on a precept of *clare constat*, after a warning, is not enough; as Haddington observes, *4th March* 1623, *Hermisheills.*

Others say, there is no difference upon which of the two it proceed; for a seasine, on a precept of *clare constat*, is a good enough title to remove *quoad* the subject-matter and lands contained in the precept of *clare constat*, but *non ultra.* It will not serve for an active title *extra subjectum proprium.* See June 1677, [page 151, § IV.] and 24th July 1679; and Stair, *tit.* Tacks, § 36.

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1679. *July* 24.—David Jack pursues a removing against Claud Muirhead, from some tenements in Hamilton, (19th Feb. 1679.) ALLEGED,—The warning is null, because he was not infeft, the time of the warning, but after. REPLIED,—The seasine being upon a precept of *clare constat*, and it being before the warning, it accresces and retrotracted; and so was sufficient.

This being reported, the Lords found the warning null; because the very seasine was not only posterior to the date of the warning, but even to the term of Whitsunday, to which the warning was made to remove. The Lords had decided the same before, as Haddington observes, who makes a difference betwixt

a seasine upon a precept of *clare constat* and a retour. See Dury, *20th Jan.* 1625, *Elphinston.*

If the seasine be prior to Whitsunday, though posterior to the warning, and within the forty days, it will be more dubious if such a warning would be null. See Dury, *18th July* 1625, *Wallace.* *Vol. I. Page 52.*

1680. *June 22.*—In the action David Jack against Claud Muirhead, (12th Dec. 1678,) craving him to count and reckon for his father and mother's intromissions, and thereby offering to prove him paid:

ALLEGED,—Their possession was by virtue of an expired comprising, (though now reduced,) and so they were *bona fide possessores, qui lucrantur omnes fructus perceptos ante litem contestatam.* REPLIED,—The apprising is *funditus* annulled, and so can never be a title.

The Lords repelled the defender's allegeance, founded on his *bona fides*, and find he is liable to count for the bygone maills and duties more than will satisfy the debt for which the comprising was led, though the legal be long ago expired. *Vol. I. Page* 103.

1681. *June* 18.—The case between them was an improbation of a tack of some lands, set by one to his mother-in-law. One of the two witnesses inserted therein being dead, the law held him for a proving witness; the other appearing, deponed he never remembered to have signed such a tack, and his reason for it is, because at other times he subscribed his name Herbertson, and in this it is Herbison.

The Lords having allowed the tackswoman to adminiculate and fortify the tack.—She adduced two extraneous witnesses, who are neither subscribing nor inserted in the tack; but they depone they were present, and heard it read, and saw it subscribed, but that Herbertson was drunk when he subscribed it.

The Lords, notwithstanding of the denial of one of the two instrumentary witnesses, yet sustained the tack, in respect the one who is dead *fictione juris* is reputed to affirm, and the two other (who are famous persons) declared they saw it signed: and for the diversity of his subscription, the Lords regarded it not; seeing it probably appeared he was then in drink.

This was judged arbitrary by some, though others saw not so much iniquity in it. And indeed *interpretatio capienda est ut actus potius valeat quam pereat.* *Vol. I. Page* 143.

1681. *June 22.* JOHN CHEISLEY of DALRY *against* JAMES and ROBERT CHIESLEY.

JOHN Cheisley of Dalry pursuing an exhibition *ad deliberandum* against James and Robert Cheisleys, his brether: ALLEGED,—He had no interest; because, by a ratification granted by him to his father, he had ratified all the rights granted by his father to his said two brothers; and so it is, that their father had disponed all his estate (except what he formerly had given his eldest son, now pursuer,) in their favours. *2do*, He, being heir, could not call for moveable bonds, bills of exchange, and a sight of the count books, and other personal estate, he having no interest in the executry by law.

The Lords, on Pitmedden's report, found that the ratification did cut him off

from craving this exhibition, if the defenders produced a general disposition from the father to all his estate, both personal and real, except the lands of Dalry and Gorgie, formerly disponed to the pursuer. But ordained them to depone anent their having of all personal bonds, discharges, tickets, bills of exchange, count-books, &c. to the effect he may understand to liberate and disburden his estate, that, by abstracting thereof, he nor his estate may not be affected therewith as heir. *Vol. I. Page* 144.

1681. *June* 22. The Town of North-Berwick *against* Sir John Nisbet of Dirleton.

The Town of North-Berwick having charged Sir John Nisbet of Dirleton for his proportion of their cess for his heritage within their burgh; he suspends, 1*mo*, He was a Lord of the Session a part of the time, and so free. Answered, —The Lords had of consent obliged themselves to bear a part, and in so far had dispensed with their privilege.

2*do*, That his houses in their town were only girnels for keeping his victual, and at shipping of it they got the anchorage and shore dues; and he was neither a burgess nor residenter; and he receiving no rent for them, they ought to bear no burden. Answered,—*Ratione rei* he was liable whatever use he made of them.

The Lords found he ought to pay for his girnels.

Then he alleged, the *quota* was exorbitant, and not proven. Pitmedden ordained the stent rolls of the whole burgh to be produced, that, after comparing his share and interest with the other neighbours, it might appear if he was overvalued, yea or not. *Vol. I. Page* 144.

1681. *June* 23. Sir Alexander Forbes of Tolquhon *against* Forbes of Waterton.

The debate between Sir Alexander Forbes of Tolquhon and Forbes of Waterton being reported by Newton; the Lords found the allegeance of the general discharge produced doth not exclude the compensation: and find that Waterton is only obliged to denude *habili modo*, by entering and infefting himself in those rights where his father was infeft, and assigning and disponing where his father was not infeft, with absolute warrandice of the lands, conform to a minute.

But thereafter the Lords having considered Waterton's declarator, they sustained it: and declared the minute void and null for not performance by Tolquhon, upon repayment of the sums paid by Tolquhon in part of the price of the bargain. And find the letters orderly proceeded at Waterton's instance for the maills and duties, unless Tolquhon pay the remainder of the price within a month; Waterton giving Tolquhon a valid disposition of the lands conform to the minute at the sight of the Lord Newton, and to compare the same with the principal. *Vol. I. Page* 144.

1681. *June 23.* JAMES LANDS *against* PETER WINCHESTER.

JAMES Lands, merchant, pursuing Peter Winchester before the bailies of the Canongate for removing from a house, he surreptitiously obtains an advocation upon most frivolous reasons. Whereupon James instantly gives in a bill craving it may be recalled, there neither being iniquity, nor incompetency, and removing being a summary action; and he was pursued either to enter the person to whom he had set the said house, or for damage.

The Lords refused the desire of the bill, in regard it was past and expede at the signet; and ordained him to discuss the advocation, and get a remit *via ordinaria.*

The Lords did the very same before in *June* 1680, betwixt George Heriot and John Hog. *Vol. I. Page* 145.

1681. *July 5.* The CREDITORS of WATSON of DAMHEAD *against* CRUIKSHANKS.

Cruikshanks having obtained a divorce against Watson of Damhead, her husband, for his adultery; his creditors raise a reduction of it, upon this reason, That it was merely done by collusion to get his wife in possession of her liferent and jointure, to the seclusion of creditors whose rights were posterior to her contract of marriage: and that the adultery proven was committed after the libel, and so could not be the legal foundation of any sentence on that libel: likeas she knew of his adulteries and cohabited with him thereafter; yea, it can be made appear she gave the woman who was with child to her husband drinks to put back the birth in her belly; and so, *dissimulatione tollitur et remittitur injuria.* This was taken to the Lords' answer by the register.

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1681. *July 5.* MARION DICKSON or COCKBURN *against* GEORGE M'KALLA.

MARION Dickson, executrix to Mr William Cockburn her husband, against George M'Kalla, merchant in Glasgow. The Lords found an executor's oath might be taken for constituting a debt owing by her husband to whom she is executor confirmed, in so far as may affect her own part of the inventory of the goods; but no ways to prejudge the nearest of kin, nor the creditors.

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1681. *July 5.* MARGARET FRASER and JOHN DALLAS her Husband *against* HUGH FRASER.

In the charge Margaret Fraser, and Mr John Dallas, minister, her husband,

against Mr Hugh Fraser, minister, this point was taken to the Lords' answer by Newton:—Where a bond of presentation of a debtor is taken under a penalty by and attour the sisting of him, but does not expressly bear that they shall be liable for the debt owing by the principal party to be presented; in case he fail, whether the paying the debt due by the principal party, in case of not presenting him, be included and implied *ex natura rei*, as the meaning and design of the parties, without expressing it. *Vol. I. Page* 145.

1681. *July* 6. GEORGE DRUMMOND *against* JAMES DUMBAR.

GEORGE Drummond, late Bailie in Edinburgh, against James Dumbar, messenger, anent his arresting the Laird of Dundass. The Lords found, where one is imprisoned for a riot by order of the privy council, and is arrested in prison by virtue of a caption for a civil debt, if the privy council release him, he cannot be detained on pretence of the arrestment;—because it falls by consequence, the first cause of imprisonment on which it depends being relaxed.

Yea Halton, (who stood very high in this cause for the privy council's jurisdiction,) and some others went this length, that, though the first cause of imprisonment had been on a caption for debt, and the second only by the council, yet he might be liberated by the council's order. Which seems most arbitrary and unjust. *Vol. I. Page* 146.

1681. *July* 7. The CHIRURGEONS of EDINBURGH *against* The APOTHECARIES.

IN the mutual declarators between the Chirurgeons and Apothecaries in Edinburgh, the Lords, before advising, named three of their number to call for three physicians, Hay, Stevenson, and Balfour; and thereafter added Burnet; to take their advice and opinion anent the true limits and distinctions of chirurgery and pharmacy. And they having made a report to the prejudice of the privileges of the chirurgeons, and the Lords having advised the controverted points betwixt them, on the 19th of July, they found phlebotomy, or blood-letting, only belonged to the incorporation of the Chirurgeons of Edinburgh, within the town, upon citizens and burgesses. But if it extended *ad pomeria urbis*, to the suburbs and liberties of it; and if they should have the sole right and power to exercise it upon strangers within the town, they desire to hear that farther debated and cleared. And found others than chirurgeons might breathe a vein, and let blood, even upon burgesses within the town, in the cases either of imminent necessity, (where a chirurgeon is not so near as another, who it may be chances to be present,) or charity to the poor. As for searcloths, found the sole application of them belonged to chirurgeons, where there was any manual operation by evisceration, incision, and exenteration; and, in other cases, that the apothecaries might apply them as well as they. And, *quoad* the summary way of chirurgeons arresting unfree-men, and offering to prove the contraventions by their oath; the Lords discharged the further using of that, (even though they gave in a

special condescendance of time, place, and persons,) till they heard that point farther reasoned in their own presence. See 14*th Feb.* 1682.

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See the subsequent parts of this case, at 30th June, 1687.

1681. *July* 8. GORDON *against* SIR ROBERT INNES.

IN the case of Gordon against Sir Robert Innes; where a bond for the price of lands bears, that it shall not be paid till the rights be perfected, and incumbrances cleared, nor bear annualrent *medio tempore:*

The Lords found the buyer was not liable for annualrent for sixteen years past, because it was all that time ere the incumbrances were purged, and security perfected.—Which was a very hard decision, considering the buyer had during all that time peaceable possession of the land by virtue of the minute, and was distressed by none; and had both the maills and duties, and yet was free of the annualrent of the price; which was *ex damno alterius lucrum captare.* But the Lords adhered to the paction: which seemed to others to be unlawful and usurary, *et pactum contra bonos mores.* *Vol. I. Page* 146.

1681. *July* 9. WILLIAM BECK *against* ANDREW PATERSON.

WILLIAM Beck having raised a reduction of an inhibition served by Andrew Paterson, deacon of the wrights of Edinburgh, on this reason, Because Andrew by his back-bond had obliged himself not to use any execution against William, on that sum, during William's lifetime;

My Lord Newton found an inhibition was not an execution, and so Andrew was not tied up from using it; seeing his back-bond did not oblige him to forbear any manner of diligence for securing himself: albeit it was ALLEGED, an inhibition against a merchant wrongs his trade. Yet inhibition strikes not against moveables.

Then they offered to prove, by the witnesses inserted, that all manner of diligence, even an inhibition, was intended and communed on to be discharged. This Newton refused, but found it only probable by Andrew the inhibiter's oath. *Vol. I. Page* 146.

1681. *July* 15. TOLQUHOUN *against* ADAM URQUHART.

IN Tolquhoun's suspension against Adam Urquhart of Meldrum, the Lords, upon Newton's report, found that Tolquhoun was wrongously imprisoned upon a caption containing teind duties from 1665; whereas, before the executing the caption, Meldrum had past from ten of these years, and restricted to 1675 and subsequent years: but it not being so restricted at the time of his im-

prisonment, but by the jailer's books it appearing to have proceeded for the whole, the Lords ordained him to be set at liberty. *Vol. I. Page* 147.

1679 *and* 1681. MARION COMBLIN *against* WILLIAM CORBY.

1679. *December* 24.—IN Marion Comblin's improbation against William Corby, the execution of an apprising being offered to be improven by Comblin as false, Corby the appriser comes to abide by the verity of it, and offers to abide at it as truly so delivered to him by the messenger. And the late interlocutor in Colin Robertson of Kindies and Skibo's case, (19th Nov. 1679,) being objected, the Lords not only ordained him to abide at it as truly delivered, but also as truly subscribed by the messenger. And allowed him, if he pleased, to adduce the messenger or other adminicles to fortify the execution; but would not bind him to stand to it as actually and really so executed.

The instrument of requisition whereupon the said apprising proceeded being likewise offered to be improven, it was craved he should simply abide at the truth of that instrument, because not only the notary is his own brother, but also he is the person in the instrument mentioned as personally compearing and requiring the money; which is a great specialty. *Vide* 15th July 1681. *Vol. I. Page* 72.

1681. *July* 15.—In the reduction, Comblin against William Corby, (24th Dec. 1679,) of his comprising, though the witnesses in the executions of the special and general charges to enter heir, and of the comprising, deponed that they did not think they were ever adhibited as witnesses to these acts, (which might be sufficient to annul and reduce the comprisings, though not to improve them;) yet the Lords being unwilling, on such a *non memini*, to take away men's rights, they farther ordained the messenger to be summoned to depone. But, if the executions be false, he for his own preservation will be loath to confess; besides, he is the appriser's own brother. *Vol. I. Page* 147.

1681. *July* 19. OGILVIE of MILTON *against* ———.

THE Lords assoilyied from a spuilyie, though it was proven that the messenger poinder was not a messenger for several months after the poinding, as appeared by his act of admission long posterior; and this only because it was alleged he was *habitus et reputatus* a messenger, and so they restricted it to simple restitution. Which some judged very strange. *Vol. I. Page* 148.

1681. *July* 21. THE ROYAL BURGHS *against* The BURGH of SELKIRK.

THE Royal Burrows, and their agent, against the Burgh of Selkirk, for choos-

ing Sir Patrick Murray, who was not an actual residenter amongst them, to be their commissioner, contrary to the king's letter in 1674, and the Act of Burrows: on which Act they charged him and the Burgh; and he presenting a bill of suspension, (the Duke of York present,) the Lords found the said Town of Selkirk had contravened the king's letter, and Act of Burrows made thereon, discharging the Burrows to elect any to represent them but actual trafficking and residenting burgesses: and in the last Convention of Estates, in June 1678, none but such were admitted: but I think it would be enough in law that they once had been burgesses and traffickers. And found the said Act of Burrows obligatory; and that Selkirk had incurred the fine: which was alleged to be 1000 merks each voter, they being nineteen persons on the council. But this fancy of the king's advocate was rejected by others, who, more analogically to law, thought the 1000 merks was only due by the whole aggregate body of the community electing. But in regard, by the act of election, it did not appear who had voted for Sir Patrick, they directed a commission to Haining, and some other neighbouring gentlemen, to take the oaths of all who gave suffrage, to whom they gave their votes; and reserved to themselves to modify the fine at the advising.

Which commission the Lords knew could not be reported this Session; and so, upon the matter, the decision of the question devolved to the Parliament itself: especially seeing in law the election might be valid, though they had incurred the penalty; like a tack set by a minister without consent of the patron, as is recorded in Dury, *Nov.* 9, 1624, *Sir Thomas Hope.*

Yet all this cautiousness did not keep the Lords of Session from the censure of some, that they, on the nose of a Parliament, came so near the deciding on dubious elections, which seemed only competent to the Parliament itself. But the Duke of Albany's presence influenced somewhat this decision.

However, this justified them, that the Parliament, by their judicative power, voted and found all the elections of gentlemen for burrows null, unless they were actual residenters and traffickers; though of old they used to be represented by any they thought fit to choose, though they were not actual traffickers and residenters. *Vol. I. Page* 148.

1681. *November* 11. JOHN COUPAR *against* GEORGE HERIOT.

IN the action pursued by John Coupar, for Mr Henry Blyth's behoof, against George Heriot, for payment of several sums of money, contained in Lieutenant-Colonel George Heriot's bonds, (to whom he was heir,) whereto they had procured assignations; of which bonds sundry wanted witnesses, and so they were admitted to prove them holograph, and to supply and adminiculate the subscription to be his: and they having accordingly adduced witnesses, and their depositions being advised this day, The Lords found it proven, by the witnesses and writs produced, that the five bonds and tickets libelled and denied, *viz.* the bond granted to Mr George Gibson, to John Ramsay, James Park, James Balmain, and John Robertson, also the account due to Andrew Cassie,—were either holograph, written and subscribed by the defunct George Heriot, at

least Cassie's account was subscribed by him. And find Mr Henry Blyth's oath does not prove the allegeance referred thereto, anent the eases, abatements, and compositions he got from the respective creditors when he paid them; and which eases would have accresced to the said George, because the said Mr Henry transacted only as his factor; and therefore decerned.

But on a bill given in by George, the Lords, on the 16th of November, ordained Mr Henry to be examined anent the eases he got, because he had only deponed as to one creditor called Bennet; and in the meantime stopped the decreet. *Vol. I. Page* 161.

1681. *November* 10.—There was but slow procedure as yet in the Session, through the demur and interruption which Advocates and Agents made of taking the test enjoined by the late Act of Parliament.

1681. *November* 12. Sir David Carnegie of Pittarrow *against* Strachan.

Upon a bill given in by Sir David Carnegie of Pitarrow, the Lords, by their deliverance, refused to force or oblige the charger to insist in discussing the reasons contained in Sir David's bill of suspension against one Strachan, charger; but if the clerk of the bills (who stopped the passing or expeding the said bill on pretence that sufficient caution was not offered,) refused to accept of a sufficient cautioner, then the Lords allowed Pittarrow the suspender to protest against the clerk of the bills for damage. *Vol. I. Page* 162.

1681. *November* 17. George Mitchelson *against* Robert Mitchelson.

George Mitchelson in Dalkeith having charged Mr Robert Mitchelson, his son, on his bond, for payment of three hundred merks of annuity; and he having suspended on sundry reasons,—the Lords looked on the son as very ungrate, the father having denuded himself of his all to him, save this aliment; and, upon Lord Forret's report, repelled the whole reasons *quoad* the annuity; but suspended the charge *quoad* the termly failyies and penalty of the bond, and as to seventy-seven pounds Scots acknowledged by the charger's oath to have been received by him; and assoilyie from the suspender's reduction. And find the letters orderly proceeded for the rest of the bygone annuities, and in time coming, the term being first come and bygone; but ordained the father, charger, upon payment made to him, to consent to the loosing of the arrestments laid on by him on his son's maills and duties. And modify an hundred merks Scots as damages sustained by the father, by the son's suffering the father to be distressed and imprisoned for these debts, for which he had granted back-bond to relieve his father, and obliged himself to pay them. *Vol. I. Page* 163.

1681. *November* 17. ALEXANDER CHAPLAIN, W. S. *against* BROWN, Relict of MARJORIBANKS.

ALEXANDER Chaplain, Writer to the Signet, pursues a general declarator of umquhile Joseph Marjoribanks's escheat, (to which he was made donatar,) against Brown his relict, and John Marjoribanks his brother.

ALLEGED,—The denunciation was unwarrantable, being after a bill of suspension presented and intimated. ANSWERED,—The stop of execution was taken off.

This, after a hearing in presence, was repelled, and declarator granted; reserving reduction of the said denunciation as accords of the law.

Vol. I. Page 163.

1681. *November* 19. JOHN INGLIS, Advocate, *against* WILLIAM CHIESLY, CHRISTIAN TARBET, and WILLIAM ALLAN.

IN the action John Inglis, advocate, against Mr William Chiesly and Christian Tarbet, and William Allan, servitor to Mr Walter Pringle, advocate; Mr William having deponed on the terms of the deposition of the new bond, the Lords ordained him to be reëxamined if he had any warrant or order from James Tarbet elder to give up the old bond to Sir John Chiesly the debtor, and to take a new one; or to cancel the two daughters' assignations; seeing his son's bringing the bond when his father was *in agone mortis*, was no presumption of any warrant he had from his father to that effect; which might have been presumed if his father had been *in liege poustie*. *Vol. I. Page* 163.

1681. *November* 23. JAMES SANDERSON *against* GEORGE JARDEN.

The debate betwixt James Sanderson, donatar to the bastardy and *ultimus hæres* of James Monteith, and George Jarden, late bailie in Edinburgh, being reported, the Lords found Fullarton's comprising null, because the execution of the denunciation of the comprising did not bear that a copy or schedule was delivered to the debtor when he was warned: though it appeared, by the execution, that a schedule was left on the ground of the lands; and that he was warned, personally apprehended, and that he was then minor. None of which special circumstances the Lords regarded. *Vol. I. Page* 164.

1681. *November* 25. ROBERT ALLAN *against* THOMAS ALLAN.

MR Robert Allan pursues Mr Thomas Allan, minister at Wachopdale, his

father, to extend and perfect a minute of disposition, granted by his father to him, of some lands in Musselburgh.

ALLEGED,—It was but a donation made by a father to his son for a provision, when he was in the cradle; and so he might alter, and revoke, and dispone it to other children, or to a second wife: which he had done. ANSWERED,—It contained no power or faculty to alter; and this would expose men *delinimentis novercalibus*, to wrong and defraud the bairns of the first marriage; *ll.* 2, 3, and 4. *D. de Inoff. Testamento.*

This being reported, the Lords repelled the defender's allegeance, and decerned the father to extend the said minute, by granting an ample disposition of these lands to his son, now pursuer. *Vol. I. Page* 164.

1681. The TENANTS of the EARL of KINCARDEN *against* The COUNTESS of KINCARDEN and other CREDITORS of the EARL.

February 23 *and* 25.—IN the action of multiplepoinding, raised by the tenants of the Earl of Kincarden against the Countess and other Creditors, the Lords, upon report, ordain the book of the register of the date of the seasine in question to be produced, to the effect it may appear whether the said seasine be therein contained; and find it relevant that the lands were united in a barony by the King, in favours of the granter, his authors and predecessors, before my Lady's infeftment; and repel the allegeance of the not payment of the 80,000 guilders of her tocher, simply as to the abating any thing of her jointure; but sustain her reply, offering to prove payment thereof, relevant to infer repetition of the 80,000 guilders, conform to the contract; reserving to the Lords' consideration the point of repetition after the probation.

Then, on the 25th February, the Lords having understood, on production of the book of the register, that my Lady's seasine was in the general register, duly registrate, and that the union of the lands in a barony is in Sir James Lumisden's charter, the Earl's author, anterior to my Lady's infeftment, therefore prefer my Lady, *quoad* her jointure, to all the creditors; and find it proven, by the discharge produced, that the 80,000 guilders were paid to the deceased E. of Kincarden. But allow the creditors to see and object against that discharge; and reserve the point of repetition of the foresaid sum, to be considered at advising the probation, and the creditors to be heard thereupon. *Vide* 29th Nov. 1681. *Vol. I. Page* 132.

November 29.—The case between the Earl, Countess, and Children of Kincardin, and the Creditors, (23d Feb. 1681,) being advised, the creditors were preferred *quoad* her 80,000 guilders of tocher, provided to the younger children at their age of twenty years, in regard the clause bore a *proviso* in case they had disponed on it; which was not done. *Vol. I. Page* 165.

1681. *November* 30. Sir David Carnegie of Pittarrow *against* The other Creditors of Graham.

Sir David Carnegie of Pittarrow's case against the other Creditors of Graham of Craigie being reported, the Lords found the inhibition ought to reduce the heritable bonds bearing infeftment, granted posterior thereto, though they related to personal bonds prior to the said inhibition, and were not merely voluntary, but were granted when the party was taken with caption.

Vol. I. Page 165.

1681. *December* 1. Janet Ramsay and ——— Browns *against* Their Creditors.

In the action of vendition pursued by Janet Ramsay in Dalkeith, and ——— Browns, her children, being minors, against their creditors; the Lords made some scruple and difficulty to find a necessity of a sale of lands for paying the debts, because the yearly rent was £100 Scots, and the debt was but 1100 merks, and none of the creditors had done real diligence, save one Laurie, who had adjudged. Yet, on considering the burden of the relict's liferent with the public burdens affecting their lands, they at length found the necessity of a sale of as much as would pay the foresaid debt, seeing seven years' rent would not pay the whole debt; and, in case a part of the lands could not be conveniently sold, then authorized the sale of the whole, if it could not be well separated and distinguished. *Vol. I. Page* 165.

1681. *December* 8. Elizabeth Brand *against* Gavin Weir's Heirs.

Elizabeth Brand, relict of Gavin Weir, merchant in Edinburgh, having given in a bill to the Lords, craving an aliment to be modified to her, for that term wherein her husband died, and in which she had entertained her daughter and her family; and also craving an aliment to her daughter in time coming, *viz.* 600 merks yearly, till she be six years old; and 800 merks yearly from six to twelve, at which time she was out of tutory; in regard the fortune was opulent, and there was no children but herself:

The Lords refused the bill *hoc loco*, and referred her to pursue for it, *via ordinaria*, by way of action.

But she, having raised an action during the dependance, on a bill, got a deliverance on the 30th March 1682, modifying 800 merks to her for entertaining the family from June (when her husband died,) till Martinmas, that her jointure begins. *Vol. I. Page* 165.

1681. *December* 8. CATHARINE CHARTERIS, ROBERT YOUNG, ALEXANDER ANDERSON, &c. *against* JOHN MUIRE, Stabler.

UPON a bill given in by Catharine Charteris, Robert Young, Alexander Anderson, and Others, against John Muire, stabler in Edinburgh; the Lords ordained the certification for not production, extracted by him in his reduction and improbation against them, to be brought back and cancelled, because it was taken out against them in absence, they being ignorant persons; they always instantly satisfying the production now, by producing in the clerk's hands the writs called for, and also paying in the sum of for the pursuer's expense in extracting the said certification.

The ground of reponing them was, That it was stolen out the beginning of November last, when their advocates were deliberating anent the taking the oath of the test, and that their production evidently excluded his active title. *Vide 29th March* 1682, *Hog.* *Vol. I. Page* 165.

1681. *December* 15. WILLIAM GILCHRIST *against* JAMES GILCHRIST.

THE case, William Gilchrist against James Gilchrist, being reported by Forret, the Lords repelled James's grounds of compensation *hoc loco*, as not liquidated nor fully instructed, though he was in a process for doing it.
Vol. I. Page 167.

1681. *December* 17. The CHIRURGEONS of EDINBURGH *against* JOHN CARMICHAEL.

THE Lords, on Forret's report, set John Carmichael, chirurgeon, at liberty, who had been imprisoned by the deacon of his calling for his divisive carriage in a meeting of the corporation, and past his bill of suspension against their fine. *Vol. I. Page* 167.

1681. *December* 21. The MARQUIS of HUNTLEY *against* GORDON of LESMOIR.

THE case betwixt the Marquis of Huntley and Gordon of Lesmoir, anent a submission, was decided in favours of Lesmoir. *Vol. I. Page* 167.

1682. *January 5.* HOMER MAXWELL of KILBAIN *against* GRIERSON of CAPINOCH.

IN Homer Maxwell of Kilbain his competition with Grierson of Capinoch; the Lords, on Harcous's report, preferred Homer Maxwell, and found Capinoch's interest, *viz.* his author Crighton of Crawfordstone's seasine, was not a sufficient title to bring him in, *in hoc statu processus;* without prejudice to him to pursue upon his right, as accords. *Vol. I. Page* 168.

1680, 1681 *and* 1682. JOHN HAY of MUIRIE *against* BALLEGERNO, POURIE, and Other CREDITORS of the last LAIRD of MURIE.

See the prior parts in the Index to the Decisions.

1680. *December* 16.—IN John Hay's declarator of recognition against the Creditors, (27th Nov. 1680;) the Lords found the inhibition used by Ballegerno against the last laird of Muiresk, being used alone, did not hinder but, by his contracting of debts posterior to the inhibition, and granting base infeftments thereon, the casualty of recognition existed, and fell in his Majesty's hands; and that the King is not concerned, though his ward vassal be standing inhibited.

But, at this rate, none will lend to ward vassals; because, in despite of their diligence, (except only a confirmation,) they can make their lands recognosce when they please.

Then the creditors ALLEGED,—The deed on which the recognition was incurred was reduced at their instance before the gift of the recognition.

The Lords also repelled this; because, in the case of my Lord Halton with Northesk, they found the recognition of the lands of Craig incurred, though the disposition whereon it depended was reduced in the Parl. 1661, *ex capite ebrietatis. Vide* 23d Feb. 1681.

Yet the Lords had found, if the disposition, the ground of the recognition, was subscribed or delivered on death-bed, it could not infer recognition; *20th July* 1669, *Barclay.* See also a contrary decision in Dury, *16th March* 1627, *L. Balmerino.*

And, in this case of John Hay, the Lords found *non refert* whether the deeds inferring the recognition were done by the person inhibited, or by his heirs or assignees, being vassals for the time. *Vol. I. Page* 122.

1681. *February* 23.—In John Hay of Muirie's declarator of recognition, against Fotheringham and others, (16th Dec. 1680,) for instructing that the lands were recognosced; John Hay, the donatar, produced sundry base seasines. Against which it being objected, that they were not probative without the charters as their warrants, but allenarly *assertio notarii: 2do,* that they were but extracts out of the registers, and not the principal seasines:

ANSWERED,—The King's donatar to the recognition cannot be supposed to have the principal seasines, or the base subaltern charters; for they are not to be got at the chancellary, as donatars of escheat may find the hornings in the register.

REPLIED,—At this rate, upon a false charter, seasine may be taken in a gentleman's ward-lands; and that seasine, once registrate, shall make his land fall and recognosce to the superior, without necessity of producing the said false charter, which they may destroy.

The Lords found the seasines alone sufficient *ad fundandam litem;* but, in respect of the preparative, the ward vassal, or his creditors, or others concerned, if he suspect either falsehood or disconformity between the seasine and its warrant, may raise an improbation of the warrants of the said base seasine, and so either get them produced or else be liberated of the recognition by a certification.

Then ALLEGED,—Some of the seasines produced were for the same sums, the one being on an original bond, and the other on a bond of corroboration thereof.

The Lords found these made not several grounds of recognition, but only one. And, some of them being only infeftments of warrandice, the Lords found they could not be considered nor made use of in the calculation of the alienating of the half, unless it were proven that distress or eviction had followed thereupon. Though John Hay's procurators craved that they might be liquidated, though not to the full value, yet to a sum, because of the hazard and uncertain event. Which the Lords refused.

The Lords conjoined Muirie's own and his author's deeds to make up the recognition. They also inclined to find that no base infeftments, either paid or renounced, and so purged before the granting of the other deeds, could be used in making up the alienation of the half, to infer the recognition. Several of thir points had been formerly decided in other cases. *Vide* 5th Jan. 1682.

Vol. I. Page 131.

1682. *January 5.*—In John Hay of Muirie's recognition against Pourie, Ballegerno, and other Creditors, (23d Feb. 1681;) it being objected against Ogilvie of Muirie, that he could not be adduced by the creditors as a witness to prove the rental of the lands, 1*mo*, Because he was not in the list of the witnesses signed by the clerk, though he was both in the diligence and in the caption: 2*do*, That he was the creditor's author, and tied to them in warrandice, and so might tyne or win in the cause; and it was on his deeds partly that the recognition was incurred:—the Lords, on thir reasons, rejected him.

Then objected against that he was Pourie's domestic servant; and so, Pourie being a party, he could not be received.

ANSWERED,—It was not Pourie, but his daughter-in-law, the Lady Ballegerno, who was the party. REPLIED,—The rights on Muirie's estate were all taken in Pourie's own name.

The Lords, before answer to this objection, ordained Pourie to give his oath of calumny, whether these rights were to his own, or to his son and daughter-in-law's behoof. *Vol. I. Page* 168.

See many other reports of this case in the Index to the Decisions, under Hay against Murie's Creditors See the concluding part of the Report, *infra*, 14th August 1684.

1682. *January* 7. EDWARD GILLESPIE *against* HUGH INGLIS.

EDWARD Gillespie's charge against Hugh Inglis, merchant, being this day advised, the Lords found, by the probation, that the skipper, Edward's cedent, had 600 deals on board; whereas to the skipper's portage, in the custom of merchants, there is no more allowed but what the cabin, the bed-rooms, and the deck, will hold or stow: and therefore allowed compensation for those deals except what the skipper should yet prove a ship of that burden might hold and contain of deals in these places above mentioned. But these deals being the skipper's own, the merchant who freighted the whole ship can only claim his damage and interest, or *lucrum cessans*, through his not having the whole loading, which is the freight and profit might be made of these deals.

The words of the interlocutor, at it was minuted by the clerk, run thus:— The Lords find, by the probation adduced, that the skipper, when he is obliged by his charter-party to bring home a full loading of timber, by the mercatorian custom his only privilege of portage is in the cabin, and where his men's beds are, and above deck; and allow the charger to prove how many deals a ship of 120 tons (which is the burden of this ship,) may contain in the foresaid parts thereof; and, in the mean time, continue the advising of the cause. *Vol. I. Page* 168.

1682. *January* 7. ALEXANDER AUCHMOUTIE *against* LORD DUMFERMLINE'S TENANTS of FYVIE.

IN Mr Alexander Auchmoutie's charge against my Lord Dumfermline's tenants of Fyvie; the presenters of the bill of suspension having refused to insist, and it having been referred to Harcous to discuss it on the bill, the Lords, on a new petition given in by Mr Auchmoutie, discharged the clerk of the bills to present any new bill in behalf of the Earl or his tenants, against Mr Auchmoutie, except only before my Lord Harcous; that so they might not steal through a suspension before another Lord, contrary to the late Act of Sederunt. *Vol. I. Page* 168.

1682. *January* 20. BROWN of DOLPHINSTON *against* MARJORY COCKBURN.

IN the debate between Brown of Dolphinston and Marjory Cockburn, about a pasturage, the Lords found the servitude of pasturage proven: but, in regard it appeared, that, for thirty years together, the parties had always transacted it, and taken ten merks by year in lieu thereof; therefore the Lords modified and liquidated it to that price yearly, in all time coming. So that these customs of a voluntary conversion are not safe, because they may be afterwards obtruded as an acquiescence. *Vol. I. Page* 170.

1682. *January 27.* JOHN CARNEGIE *against* WILLIAM CUTHBERT.

JOHN Carnegie, Provost of Forfar his charge against William Cuthbert is reported, and the reasons of suspension repelled, and the Provost's decreet sustained, bearing, that Cuthbert had judicially, in face of Court, confessed the contumacious expressions libelled against him; though his confession was not subscribed by him, but was only the assertion of the town-clerk. *Vide* 19*th December* 1679, *M'Jor*, where the contrary was found, in his case with the Town of Kircudbright. *Vol. I. Page* 171.

1682. *January 27.* MAJOR ARNOT *against* ARNOT of FAIRNEY.

MAJOR Arnot's case against Arnot of Fairney, his nephew, was decided, and the bond found to be moveable, and so to belong to the Major.

The Lords recommended Fairney to the Major's favourable discretion; as they did the Fleshers of the Canongate to the Magistrates of Edinburgh, *November* 1677. But *legis est jubere et imperare, non suadere solum.*
Vol. I. Page 171.

1682. *January* 31. HAMILTON of WISHAW *against* ————.

THE case betwixt Hamilton of Wishaw and ———— was reported, and his ground of compensation repelled. *Vol. I. Page* 171.

1681 *and* 1682. The MASTER of BALMERINO *against* FOTHERINGHAM of POURIE.

1681. *February 2.*—THE Master of Balmerino's cause with Pourie Fotheringham was decided in the Master's favours, because Pourie could not prove that he had acquainted the Master with the communing betwixt him and the Earl of Crawfurd, for that gift of Bandoch's casualties. See 1*st. Feb.* 1682.
Vol. I. Page 128.

1682. *February* 1.—The debate betwixt Pourie Fotheringham and the Master of Balmerino, (Feb. 2, 1681,) was advised, and the progress of the right found sufficient; only the Master, for Pourie's farther security, is ordained to give him real warrandice out of other lands. *Vol. I. Page* 171.

1682. *February* 1. BOWAR of KINCALDRUM *against* The EARL of MARISHAL.

BOWAR of Kincaldrum's pursuit against the Earl of Marishal, as representing his brother and father on the passive titles, was reported, and the Earl assoil-

yied.——The title of Marishal was enforced as a representation, from Spelman, Skinner, &c. *Vide supra*, February 1680, [page 348, No. XVII.]
Vol. I. Page 171.

1682. *February* 8. JAMES HALIBURTON *against* JAMES ANDERSON of WESTERTON.

JAMES Haliburton, writer in Edinburgh, against James Anderson of Westerton. The Lords,—before answer, and ere they would repone him on paying the expenses against a decreet wherein Mr John Stewart compeared as his advocate, and took a day to produce him to depone, and the term was circumduced against him,—ordained Anderson to give his oath of calumny if he could deny but he had employed an advocate or agent to look after that affair, and so looked on himself as *pars contradictor* therein; and, if he confessed this, then he nor his advocate should not be permitted to disclaim their appearance, made in that decreet whereon he is now charged; for it were a very dangerous thing to bind debts on parties by advocates their officious appearing for them and proponing defences, or taking days to produce them. *Vol. I. Page* 172.

1682. *February* 11. WILLIAM SHIELS *against* GAVIN NISBET.

IN the action, William Shiels, merchant, against Gavin Nisbet, cordiner; the Lords, on Pitmedden's report, refused to repone Nisbet to a defence which was competent to him in a former count and reckoning, whereon there was a decreet extracted, and which was then omitted by him.

The defence now sought to be received was, That Shiells ought to hold count and reckoning to him for what rents of his lands he might have intromitted with and did not, not being legally debarred. *Quær.* if this competent and omitted would exclude Nisbet, if he should raise an action for payment and declarator that Shiells should be liable for those rents which, *ejus culpa*, he lost.
Vol. I. Page 172.

1682. The COUNTESS of TRAQUAIR and MARQUIS of QUEENSBERRY *against* The EARL of SOUTHESK.

January 18.—IN the count and reckoning betwixt the Countess of Traquair and Marquis of Queensberry against the Earl of Southesk; the Lords, on Harcous's report, found Southesk's entry to the lands was in 1653, and that the rental by which he must account is that which was given in by Burnet; except for the years 1674 and 1675, wherein, through a violent storm, there was a great death of cattle. *Vide* 11th Feb. 1682. *Vol. I. Page* 170.

February 11.—The Lords, on Newton's report, assoilyied from the ejection, because it was done *auctore prætore*; though the sheriff's decreet of removing, whereon it proceeded, was afterwards reduced; and that *quia res judicata* (as long as it stands,) *pro veritate habetur*. *Vol. I. Page* 173.

1682. *February* 11. James Hamilton and William Ewing *against* Jack and Thomson, her Cautioner.

In the cause James Hamilton, merchant, and William Ewing, against Jack and Thomson, her cautioner as law will; the Lords, on Redfoord's report, found the obligement to present her within terms of law, by the burgal custom, signified within the fifteen days of the charge: but found the cautioner had fulfilled the same by the instrument produced, bearing, that he had sisted her at sentence; and therefore assoilyied him. *Vol. I. Page* 173.

1682. Elizabeth Hill *against* James Hill.

January 27.—The plea between Elizabeth Hill in Queensferry and James Hill her brother being advised, the Lords ordained her to renew the assignation.

The words of the interlocutor ran thus:—The Lords, having considered the defender's oath, ordained her to renew the assignation in favours of the pursuer, her brother, to the thousand merks' bond due by Dundass of Duddingston to her, in the terms of the double of the assignation produced, excepting from the warrandice thereof the assignation formerly granted by her to the pursuer now alleged to be lost, and craved to be made up; and assoilyie her from the other article of the libel, anent her giving to him another assignation to the moveables, seeing it appeared the former was only a trust, and he had retrocessed her.

We contended for Elizabeth, that she could not be decerned to renew the assignation to the bond, because it was only granted by her *stante matrimonio* with the consent of her husband; and since his death she had revoked it, and raised a reduction of it as being then done without any onerous cause.

This the Lords repelled, and did not think it the same case with a married woman's bond granted by her *stante matrimonio*, which is *ipso jure* null. *Vide* 16*th February* 1682. *Vol. I. Page* 170.

February 16.—The action Hill against Hill (27th January 1682,) being on new heads reported by Newton, *viz.* that the assignation bore, that, if he did not punctually pay her forty pounds yearly, he should forfeit the said assignation, and that he had failed in punctual payment:

The Lords found the irritancy was incurred; but if the said James Hill would instantly pay or consign at the bar the bygones, with her other necessary expenses at the Lords' modification, then they reponed him: and declared, that the irritancy shall be committed, if in time coming he shall not make punctual payment thereof within ten days after the term. *Vol. I. Page* 174.

1682. *February* 16. PROVOST FERGUSON *against* FERGUSONS, his Son's Children.

PROVOST Ferguson is found, by the Lords of Session, on Boyn's report, in his action against his son's children for aliment, to have alimented his two grandchildren *ex pietate paterna* for the two years he claimed; and therefore refused him any aliment. *Vol. I. Page* 174.

ANENT SUSPENSIONS without CAUTION.

THE Lords begin now to refuse to set debtors at liberty on suspensions without caution, though they offer *cautionem juratoriam*, unless they also consign a disposition of their moveables, as bankrupts do of their whole estate both heritable and moveable. *Vol. I. Page* 174.

1682. *February* 18. SIR ARCHIBALD STEWART *against* SIR JOHN GORDON of PARK and ARTHUR FORBES.

IN Sir Archibald Stewart's case against Sir John Gordon of Park and Arthur Forbes, the interdiction was annulled for the want of the oyesses, and on the other adminicles adduced. This being stopt, and a clamour made; on the 28th February 1682, the Duke of Albany being present, it was debated of new.

Quær., If one interdicted grant a bond with cautioners, and if he reduce the bond as granted by him when he was interdicted, if this will free the cautioners. It is thought not; no more than the cautioners of a minor or a wife are freed, though the principals be. *Vol. I. Page* 174.

1681 *and* 1682. SIR PATRICK NISBET of DEAN *against* The WEST KIRK POOR.

December 9.—THE case betwixt Sir Patrick Nisbet of Dean and the Poor of the West-Kirk Parish, anent their rights on Alexander Sked's lands in the Water of Leith, being reported; the Lords repelled the first answer made for the Kirk-session, against one of Sir Patrick's and his son Hary his seasines produced, *viz.* it was null, because it did not bear production of the heritable bond, the warrant thereof; and that in respect it was granted *propriis manibus*: and, before answer to the second answer made for the Kirk-session, ordain their procurators to condescend on the particular acts of dole, whereby Sir Patrick Nisbet, being an elder of the kirk, and so their trustee, postponed and obstructed the Kirk-session's diligence, to prefer himself. As also, before answer to the third, appoint parties to be heard before the reporter, whether the time of the dating of the confirmation of the base infeftment,—(which was subscribed be-

fore Sir Patrick's confirmation; but he, being superior himself, did put in a date posterior to the confirmation which he gave to his son;)—or the time of the delivery of the said confirmation, ought to be respected: which delivery was after his son's confirmation some days; and he ought not to have gratified and preferred so conjunct a person as his son, to the prejudice of the poor.

But they had not required him, or taken instruments against him, on the true date of their requisition; because they were to get it gratis from him, and he might have demanded a composition. *Vide infra*, 18th Jan. and 18th Feb. 1682. *Vol. I. Page* 165.

1682. *January* 18.—The case betwixt Nisbet and the Poor of St Cuthbert's Parish, (9th December 1681,) being reported by Pitmedden; the Lords sustained the Poor's condescendance, and, before answer, admitted it to probation by the oaths of the elders and others. *Vol. I. Page* 170.

February 18.—Between the Poor of the West-Kirk Parish and Sir Patrick Nisbet, (9th December 1681;) the Lords having advised the depositions of the witnesses for proving the condescendance, with Sir Patrick's oath, they found he used indiscreet means for getting himself preferred to the Poor of the West-kirk in diligence, though an elder; and therefore, though his right and confirmation was prior in date to the Poor's, yet they ordained the Poor to come in *pari passu* with him, and the maills and duties to be divided equally betwixt them, conform to their several rights and infeftments upon Alexander Sked's lands on the Water of Leith. *Vol. I. Page* 175.

1682. *February* 21. PATRICK CADDEL *against* JOHN HALL.

PATRICK Caddel against John Hall, late bailie in Edinburgh. The Lords, on Saline's report, ordained, before answer, the disposition founded on by John Hall, and granted by Mrs Caddel to her son Patrick the pursuer, for relief of his becoming cautioner for her to John Hall, to be produced, before they determine if it was a ratification or homologation of this debt, (contracted in his minority,) after his majority: and grant diligence against all havers for recovery thereof. *Vol. I. Page* 175.

1682. *February* 21. The LADY PITCAIRLIE *against* Sir DONALD BAIN *of* TULLOCH.

The Lords, upon Halton's report, find that umquhile Mr John Bain of Pitcairlie, his writing chamber in Edinburgh, ought not to be sold for the payment of his debts; but that the same belongs to John M'Farlane and Rorie Bain, in terms of the bond of tailyie; and that they may presently enter to and possess the said chamber. And find that Pitcairlie's relict, by his destination, is liable to the whole debts, and to relieve the heirs of tailyie thereof. And, in order to the satisfying the said debts and relieving the heirs, they decern her presently

to exhibit all the debts she has already satisfied, with the discharges thereof, and to assign to the debts that are resting to the defunct; which they ordain the heirs to accept of, for their relief *pro tanto*, in so far as the Lord Reporter shall find the same to be sufficient debts: and remit to the reporter to hear the parties, how far the said debts do exceed the said bonds so to be assigned; and to decern the relict presently to relieve the heirs of the said superplus debts, either out of the moveables or out of the liferented lands. *Vol. I. Page* 175.

1682. *February* 21. STEWART, Tutor of Innernytie, *against* Sir JOHN AYTON of that ilk.

IN the action pursued by Mr Stewart, tutor of Innernytie, and Sir John Ayton of that ilk, anent an assignation made by Innernytie to Sir John of a bond of four thousand merks, which the tutor of Innernytie alleged was never delivered, at least to have been revoked and altered, and taken back again, and that it was lying beside the defunct the time of his decease; whereon the Lords had examined witnesses for both parties; and their depositions coming this day to be advised, the Lords, after a long deliberation, before answer, recommended to Lord Forret and others to try and endeavour a settlement betwixt them. *Vol. I. Page* 175.

1682. *February* 22. The late LORD ROLLO'S CREDITORS *against* The present LORD ROLLO.

SOME creditors pursuing Lord Rollo on the passive titles, for payment of his father's debt, and witnesses being adduced, they led some other creditors of his; and it being objected against them, that they were to be suspected as interested:

The Lords allowed them, seeing they were not personal creditors merely, but wadsetters secured *aliunde*; (though he, if once heir, then became liable to them in the requisition;) but with this express declaration and provision, that their testimonies should not prove, when they came to insist against him for their own proper debts, and so it was not *in re propria*.

Yet it was *amicum testimonium illius qui consimilem fovebat causam*, who might tyne and win in the cause; and at this rate the creditors who now pursue may be adduced as witnesses to serve those creditors who now depone, in fixing a passive title on my Lord: and the decision was thought dangerous.

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1682. *February* 22. JAMES OGILVIE *against* GILBERT GOURLIE.

THE case, James Ogilvie, apothecary in Edinburgh, against Gilbert Gourlie being reported by Newton, the Lords, before answer, ordain Gilbert Gourlie to

produce the notary to the instrument of possession used by him on his assignation, that he might be examined on the verity of the said instrument: as also ordain James Ogilvie to adduce the witnesses in the testament, and any other habile witnesses, to be examined what the carriage of the defunct was the time of her subscribing the testament, and what she declared at that time in relation to her granting a disposition to Gilbert Gourlie, or at any time after granting the said disposition; and assign the 10th day of March next to both parties' procurators to the effect aforesaid; and in the mean time grant warrant to the bailies of Edinburgh to inventary and sequestrate the goods.

Thereafter, on a bill presented by the said Gilbert, the Lords, on the 7th March 1682, granted this deliverance:—Having considered the petition, allow the supplicant, the 20th instant, to produce the notary, (in respect it was said he dwelt at Dumfries; though Gilbert pled that he should not be burdened to produce him at all, unless they offered to improve, and consigned;) and grant warrant to the Magistrates of Edinburgh to cause roup the goods within the house by a neutral person to be appointed by them, at the sight of both parties; and for that effect that the diets of the roup be intimated to the parties, a competent time before; and appoint the magistrates to retain the money that shall be gotten for the goods at the rouping, to be made furthcoming to the party who shall be found to have the best right. *Vol. I. Page* 175.

1682. *February* 23. DAVID FORBES and CATHARINE CLERK, his Spouse, *against* Sir JOHN CLERK of PENNYCUICK.

MR David Forbes, advocate, and Catharine Clerk, his spouse, pursuing Sir John Clerk of Pennycuick, her brother, for their mother's executry; Catharine having confirmed herself executrix *ad omissa et male appretiata*, Sir John ALLEGED, That, after the mother's death, the father had provided the said Catharine, now pursuer, to a very opulent tocher of ten thousand pounds; and, seeing *debitor non præsumitur donare*, it must be presumed to have been applied by the father debtor to be in satisfaction of the mother's executry in the first place.

ANSWERED,—This brocard doth not hold between parents and children.

The Lords, on Forret's report, repelled the defence against exhibition, and ordained Sir John Clerk to produce and exhibit his father's count books, by which it might appear what his estate was at the time of his wife's death, that her executry might thereby be known and valued. *Vol. I. Page* 176.

1682. *March* 1. JOHN TROTTER *against* ALEXANDER YOUNG.

JOHN Trotter pursuing Alexander Young, merchant in Edinburgh, as cautioner for a factor in Campvere; he founded on an exoneration he had got of his cautionry from the royal burrows, by their act.

The Lords found he was not liable for any goods sent to that factor after

the date of that liberation; though they were shipped three days before it, and the said discharge or exoneration of the cautionry was not intimated to the merchants. *Vol. I. Page* 177.

1682. *March* 1. ROCHEID'S DAUGHTER *against* ROCHEID, her Father.

ONE Rocheid in the Merse being pursued by his daughter, to grant her a yearly aliment; to which he was unwilling, because he doubted of her legitimacy; (for he was divorced from her mother, for her notour adultery:)

The Lords found him liable to aliment her; but, in regard he offered to take her home to his own house, assoilyied him from any modified aliment; and ordained her to go home, and stay with him; and would not astrict him to entertain her elsewhere, unless he had beat her usually. *Vol. I. Page* 177.

1682. *March* 1. ANDREW DICKSON *against* JOHN RAE.

ANDREW Dickson against John Rae, upon the indentures. The Lords, upon Drumcairn's report, ordained John (since he had deserted his employment, for the test, so that he could not teach him,) to give back the half of the apprentice fee, *viz.* £50 Scots, the half of the time being yet to run; and would not summarily *hoc loco* take in several malversations, alleged by John to have been done to him by his said apprentice; but reserved them to be pursued *via actionis* as accords. Then Andrew gave in a bill craving expenses; which the Lords denied to grant. *Vol. I. Page* 177.

1682. *March* 8. GEORGE BANNERMAN *against* MALCOLM of BALBEDIE.

MR George getting a new gift from the king, of being chamberlain of the king's rents in the Stewartry of Fife; Balbedie competes on an old gift he had, clad with possession. ALLEGED,—He had lost it; because he had not taken the test. ANSWERED,—This office was not comprehended nor expressed in the Act 1681, anent the test. REPLIED,—The general clause includes it. DUPLIED,—He was *in bona fide* not to guess or divine that; and he is now willing to take the test; and *res adhuc est integra, et est locus pœnitentiæ.*

The Lords found, that, since he had not taken it before the 1st of January 1682, fixed by the Act, he had lost his office: and would not allow him to take it now.

This extension is dangerous; and, *a paritate*, may reach commissioners of excise, baron-bailies, (both which were once spoken of in the Parliament to be included, but were *de industria* omitted, that they might be free of the test;) and many others, who do not look on themselves as in public offices.—Balbedy's son

had the survivance of his father's place. *Quær.* since the father is now deprived, if he may not enter to it, upon his offering to take the test, as if his father were *civiliter mortuus*, and so exclude Mr George his posterior gift.

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1682. *March* 9. MADAM BROOMLAY *alias* FRASER *against* Sir PETER FRASER.

See the prior part of Fountainhall's Report of this case, and the Reports of Harcarse and Sir P. Home, in the Dictionary, page 4378, *et seq.* and page 4817.

MADAM Broomlay against Sir Peter Fraser; (7th February 1682.) The Lords, on Newton's report, find him personally liable, unless he will renounce to be heir; though he be a minor only of sixteen years, and at the grammar schools: but in regard it is not yet fully year and day since his father died, they allow him any time within the year, to give in his renunciation.

Whereas he should not have been pursued till year and day was past. The specialty was:—he was infeft in fee by his father in his own lifetime, which he did not offer to renounce. See the contrary of this, both in Haddington and Dury, at the *25th June* 1624, *Somerville.* *Vol. I. Page* 177.

1682. *March* 9. JOHN MARTIN *against* JOHN BROWN.

AT Privy Council, John Brown of Nunlands is assoilyied from John Martin's pursuit, for having acted as bailie of regality of under my Lord Nithsdale, his constituent, who had not taken the test; seeing he had taken it himself, and had a gift of the place *ad vitam et culpam* from him. He was also quarrelled for finding him guilty of the theft of some dozens of apples. Though we say *de minimis non curat lex*, yet *justitia non consistit in quantitate.*

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1682. *March* 10. CRAWFURD and CAPTAIN WISEHEART *against* JAMES LITSTER.

CRAWFURD, and Captain Wiseheart her husband, against James Litster, baxter in Linlithgow, on a decreet-arbitral. The Lords, on Tarbet, Clerk-Register's report, repelled the reason of suspension against the seventy-five pounds, and the interest, in respect of the decreet-arbitral; and repelled the reason against the 181 pounds, upon account of Litster his own usury; but refused to sustain as to the annualrent thereof: and allow the expense of the comprising, to be paid before the same be delivered up: and allow Litster yet to produce the warrant from Chalmers as to the eighty pounds; otherwise they also sustain he decreet-arbitral as to that. *Vol. I. Page* 177.

1682. CATHARINE CHARTERIS *against* JOHN CHARTERIS, her Tutor in Law.

January 17.—CATHARINE Charteris, only daughter and child now in life to umquhile Mr Lawrence Charteris, advocate, gives in a bill to the Lords against John Charteris, her uncle and tutor in law, complaining that he pretended to be heir-male to her father, and so sought to debar her, the heir of line, from succeeding; and therefore craving that he might either be ordained to serve her heir of line, or else to be removed as suspect and malversing.

ANSWERED,—*Officium nemini debet esse damnosum*, and he was not bound to prejudge his own right; but he was content to secure her in the £10,000 Scots, provided to her in the contract.

The Lords, finding a competition would arise between the tutor and his pupil, thought it not a just ground of depriving him; but declared that they would elect another tutor to her, only *ad hanc litem* with her tutor.

Vide § *ult. Institut. de Auctoritate Tutor.* and 55, 4, and 11, *Institut. de Excusat. Tutor.* and the Commentators, where it is a cause of excusation of a tutor *si litem moveat pupillo super toto hæreditate vel maxima ejus parte.*

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March 14.—John Charteris's case against his niece (17th Jan. 1682,) is decided. The Lords, upon Pitmedden's report, found the provision to the daughters, in case there were no sons, of a particular tocher, was but a destination, which failed by Mr Lawrence having a son, who was served heir by the same John, his uncle and tutor in law, though he be now dead; and therefore preferred Mr Lawrence's daughter to his brother John, the heir-male, seeing there was no formal tailyie.

The contract-matrimonial was ill drawn; and it was *casus arbitrarius.* Yet certainly judges are to look mainly to the design and meaning of parties; and the taking hold of the naked existence of an heir male, and his service, was *cortici verborum inhærere*,—to interpret *quibus deficientibus* only and strictly to mean *quibus non omnino existentibus:* which could scarce be any rational man's meaning, let be a lawyer's. And it was offered to be proven that Mr Lawrence was ever an enemy to his daughters succeeding to all, so that it was *quæstio voluntatis presumptæ, et controversia inter το ρητον et την διανοιαν, inter dictum et intellectum;* between the words and the true sense and meaning of the parties; which certainly ought in all contracts to preponder, even to the impropriating the words. The case of the judicial law of Moses, anent Zelophehad's daughters succeeding to their father, was urged against John.

The words of the interlocutor are thus:—The Lords find that the estate controverted is no tailyied estate; and that, the son surviving the father, and being served heir, the sole right did stand in the son's person; and the daughter does succeed to her brother, and excludes the other heirs-male; and that, in respect the clause runs only, *In case that there be no heirs-male procreated of the marriage, then the daughters to get the portions mentioned:* which case did not exist, because there was a son who survived the father, and was served heir.

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1682. *March* 14. GEORGE SEATON of BARNS *against* The LADY BEARFORD, his Sister.

IN George Seaton of Barns his petition against the Lady Bearford, his sister, the Lords, after a debate *in præsentia*, refused to give an act declaring the validity of their own extracts under the clerk-register's hand; in regard it was not craved by any warrant from the Irish judges, where the affair was depending, but only by a private party. Yet the noble *senatusconsultum*, or Act of Sederunt, in Latin, made on the 31st day of July 1596, (which is not recorded till the 17th of November 1599,) is very positive that such extracts are as probative as the principal writs, except in case of falsehood and improbation.

Yet Barns' Irish counsel-at-law ALLEGED,—That Act was only a desire of the Lords of the Session to foreign judicatures, to esteem our extracts as probative; but they saw no answer from other courts granting the same. But they mistake it; for, 1*mo*, It is declaratory what is the import and strength of these extracts in our law and custom; and, 2*do*, It is petitory, that they may pay them the same deference and respect; else they will not repute what shall come from the clerks of these sovereign courts as authentic. Which was all the certification the Lords could give against coördinate independent courts.

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1682. *March* 22. SKIRVEN, Plumber, *against* JOHN WILKIE, Tailor.

THE Lords, on Pitmedden's report, ordered the communers and witnesses to the bargain to be examined, if Skirven followed the faith of Thomas Wilkie, the mason, builder of the house, for the price of his lead, or of John Wilkie, the owner of the house; (who had agreed with the mason on a penny for all;) also ordain the condition of the said Thomas Wilkie to be condescended on, if he was then insolvent or not. *Vol. I. Page* 179.

1682. *March* 24. ROBERT STEWART *against* certain MERCHANTS in EDINBURGH.

IN Robert Stewart, factor, his case with some Merchants in Edinburgh, the Lords, on Harcous's report, found the letters orderly proceeded for Robert: but sustained the Merchants' declarator of fraud and circumvention, in taking ten crowns on the same wine from them, more than he took at the same time from Hollanders and other strangers. And admitted it to probation, as *dolus* both *in consilio et re*.

Though we allow not reductions *ob læsionem ultra dimidium justi pretii, ex l. 2 C. de Resc. Vendit.*, yet our law will repress cheating. *Vide* 11*th Jan.* 1682, *Bonar* and *Neilson*. *Vol. I. Page* 179.

1682. *March 24.* JAMES ELIES *against* CATHARINE THOMSON and LORD CASTLEHILL.

IN Mr James Elies of Stanhopmiln's cause against Catharine Thomson and my Lord Castlehill, her husband; the Lords, on Saline's report, sustain Castlehill's defence of compensation, founded on the account produced by him, mentioning more articles than the 20,000 merks; and that, notwithstanding that the bailies of Edinburgh's decreet, founded on by Stanhopmiln, pursuer, mentions and relates to a fitted account; in respect of the said fitted account produced, which they find to be the very account related to in the said decreet; and that in respect of James Elies's declaration produced; and although the account is in some articles delete and scored, and the date of it unclear. This last line anent the deleting was disputed, but was not in the interlocutor; but the Lords went over it.

Then the Lords ordained both parties to count and reckon with each other, on Castlehill's summons against Stanhopmiln, for counting and reckoning, as heir to his father, who was cautioner for the said James Elies, factor at Campvere; which James, the factor, Castlehill alleged, was owing to Patrick Thomson, his lady's father, other sums besides the said 20,000 merks, contained in the bailies' decreet, So that the Lords found, by this interlocutor, (which was very strange,) that neither the fitted account, betwixt Patrick Thomson and James Elies, nor yet the decreet following thereupon, did comprehend all debts and accounts betwixt them preceding their dates; but that Patrick's heirs might yet charge James's representatives, and his cautioners, as factor, with other articles not stated in the said fitted account. Whereas we urged, the Lords might call for the opinion of merchants, and by it they would find that, in their customs, a stated account was presumed, in mercatorian law, between merchants, to include and comprehend all articles they had to charge one another with, preceding the date of that fitted account.

Then a bill was given in against this by Stanhopmilns. But it was refused; only they ordained Castlehill to depone, if, after search among all his father-in-law's papers, he had found, or knew any other account between them, except this vitiated one he produced. Which he denied upon oath.

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1682. *March 24.* GORDON of TROQUHEN *against* CANON of BARNSHALLOCH.

See the prior part of this case, Dictionary, page 4722.

THE Lords, having heard Halton report the debate, find it is *jus tertii* to Barnshalloch, the defender, to propone upon the minute entered into by the pursuer with the rebel; and find the defender has not the benefit of a possessory judgment; but grant joint probation to both parties, for proving the rental of the lands possessed by them hitherto *pro indiviso*, as conjunct donatars to M'Lennan of Barscobe's forfeiture; Troquhen for three parts, and Barnshal-

loch for the fourth; to the effect it may appear whether or not the lands the defender possesses be the just fourth part of the whole lands.

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1682. *March* 25. ANENT TOCHER.

IT was argued amongst the lawyers:—Whereas, by our custom, when a marriage dissolves within year and day, we re-integrate all things, and give back the tocher, and the wife gets no jointure, unless there is a child born; it was thought more just and reasonable to give the woman (who is devirginated) her election whether she will take back the tocher or will betake herself to the jointure and liferent.

2do, It was argued; where a marriage dissolves within year and day, and no bairn is procreated within that time, but, before the marriage, there was a child procreated, and which was legitimated by the marriage; *quæritur*, if he will gain the tocher or courtesy by this. Some think he will; because such a child, *fictione juris*, is held in all respects as born *in legitimo matrimonio*; and, though this seems to encourage and bestow privileges upon uncleanness, yet it does gratify it no farther than the subsequent marriage does. Yet that of the return of tochers being *ex jure consuetudinario* with us, it ought not to be extended *ultra proprium suum casum*; and the words of the custom seem to run against his gaining of the tocher; seeing the child is not truly, but only *præsumptione juris*, born after the marriage.

3tio, It was doubted among the advocates,—where, by a contract-matrimonial, a tocher is appointed to return to a wife's heirs and executors, why a husband may not crave, though the marriage be dissolved, and his wife was not an heretrix of lands, to liferent the said tocher by the courtesy of Scotland, as he would liferent her lands? Though it has not yet been done, yet nevertheless some thought it might be so extended by the Lords *a paritate rationis*.

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1682. *March* 28. ROBERT GIBSON *against* GEORGE HANDYSIDE.

ROBERT Gibson, merchant in Edinburgh, against George Handyside, clerk to the Weigh-house in Leith, and James Livingston, his cautioner. The Lords, from the probation, found it was not proven to be the custom of the tackmen of the Weigh-house of Leith, to accept of precepts or decreets against these who have goods lying there, in part-payment of the tack-duty which the clerk of the said Weigh-house accounts for to the tacksman. *Vol. I. Page* 181.

1682. JOHN TROTTER and BARBARA YOUNG, his Mother, *against* ROBERT TROTTER, his Uncle and Tutor.

March 24.—THE Lords ordain both the processes of exhibition, and that for removing the tutor as suspect, to be summarily discussed without enrolling; that the minor's effects might not be embezzled nor prejudged *medio tempore* by this long ensuing vacancy. See the *29th* and *30th March* 1682.

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March 29.—The Lords, on Castlehill's report, found they had power summarily to discuss such an *actio suspecti tutoris* without enrolling, notwithstanding that, by the first article of the regulations 1672, all privileges are discharged, except as to the King's own proper causes. Likeas, they found the mother had interest, (though debarred from her children's tutory, by her husband's appointment,) *postulare suspectum tutorem*, seeing it was *actio popularis*, in so far as any of the blood relations may pursue it. *Vide infra*, *30th March*.

Vol. I. Page 182.

March 30.—In the case Trotter against Trotter, (mentioned 29th current;) the Lords again, on Castlehill's report, found there is ground for removing the tutor from his office, because he had not made up inventaries conform to the Act of Parliament 1672, (though he was framing them, and it was not yet a year since his entry.) But declare, if the tutor will find sufficient caution, or get sufficient persons one or more to join with him in the office of tutory, before the extracting of the decreet, at the sight of the reporter, they allow him to continue; otherwise the Lords decern in the declarator. For the Lords apprehended the tutor was poor and might dissipate. *Vol. I. Page* 182.

Winter Session, 1681–2. WILLIAM HOGG, Advocate, *against* SIR WILLIAM KER.

[See the prior parts of the Report of this Case, Dictionary, page 1,3109.

MR William Hogg, advocate, at last prevailed in his declarator against Sir William Ker, (3d February 1680,) and the Lords again reponed him to the place he had in the Chancellary Chamber. *Vol. I. Page* 182.

1682. *March* 30. GORDON *against* PETRIE.

GORDON, a trooper, who had married Petrie, daughter to a rich farmer in Salton, being denied the tocher, because it was left by her father conditionally, if she married with Fletcher of Salton's consent:

The Lords found it sufficient that she had required Salton's consent, though she did not obtain it; unless they will allege some reasonable cause of his dissent, or some disproportion in the match: though it was offered to be proven that her father, before his death, had declared his aversion to her marrying of

that man; but, *nota, they call him Gordon.* See the contrary decided in Dury, 16*th December* 1629, *Home.* *Vol. I. Page* 182.

1682. *July* 5. The Town of Paisley *against* The Sheriff of Renfrew.

Pitmedden, being this week on the Bills, reported the case of an advocation given in by the Town of Paisley against the Sheriff of Renfrew, craving a general advocation of all actions that should be pursued against any of their inhabitants before the Sheriff's Court; because they were expressly exemed by their charter in 1448, given them by King James IV. with all the privileges of the burghs and abbacies of Dumfermline, Newburgh, and Arbroath; and they had a declarator of their exemption depending before the Lords.

The Lords refused a general advocation, as unusual; but, when they should be pursued, ordained them to give in special advocations of each particular action, and the Lords would consider them.

Yet I see a general relaxation against all hornings *quoad* the effect of a service, granted to the Earl of Crawfurd, in Dury, 19*th June* 1630.

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1682. *November* 7. Elizabeth and —— Barclay and Phin, their Mother, *against* Phin and Duncan.

In a declarator of the commission of a back-tack in a wadset, for not paying the back-tack duty, by the space of three or four terms run together; it was alleged, The back-tack not being conceived under an irritancy in case of not payment, by suffering two terms to run in the third unpaid, the failyie could not be declared.

The Lords, upon Forret's report, found such back-tacks had, in their own nature, a legal irritancy, though there was none in the contract and paction; and therefore declared it was incurred; and admitted the creditor to the natural possession of the wadset-lands, unless the debtor would purge the failyie by payment of the bygones before extract, and would find caution to pay it in time coming.

Though some cried out on this as extraordinary, yet the same was decided before; whereof Stair, *tit.* Tacks, p. 338, gives instances.

Vol. I. Page 192.

1682. *November* 7. Doctor Hary Blyth *against* Lawson.

Mr Hary Blyth, Doctor of Medicine, pursues a reduction of a comprising led by one Lawson, upon this ground, That the lands of Soultry, which are ap-

prised, at least a part of them, lie locally within the shire of East-Lothian, and yet they are denounced to be apprised at the market-cross of Edinburgh, whereas they ought to have been denounced at Haddington cross; and so, the execution being wrong and null, the comprising falls, *quoad* that part at least.

ANSWERED,—Though a part of the apprised lands are indeed locally situated in East-Lothian, yet they are but a part of the barony of Soultry, which lies, *in confinio*, betwixt the two shires, in the west limits of them; but the greatest part lies in Mid-Lothian, and therefore, by constant practice, all diligence in relation to that whole barony has been always hitherto done and executed at Edinburgh, the greater part drawing the lesser; and *error communis* being able *facere jus pro præterito*, at least to excuse and maintain a standing diligence.

The Lords demurred on this; and first annulled the apprising; but thereafter, in respect of the consuetude, sustained the denunciation and apprising, and found it no nullity. *Vol. I. Page* 192.

1679, 1680 *and* 1682. SARAH KEIR and JOHN WEMYSS, her Husband, *against* DAVID FERGUSSON.

1679. *November* 14.—IN the charge given by Sarah Keir and John Wemyss, her husband, against David Fergusson in Kirkaldie, for employing 13,000 merks for her liferent use, conform to her contract-matrimonial with his son:

It was ALLEGED, He was not personally bound in that clause of employing, but only *nomine tutorio* for his son; it only bearing that he took burden for his son, in respect of his then minority; which in law can import no more but that he was cautioner for his son that he should not revoke the provision made to his wife; and, he becoming major, and never having revoked it, the obligement as to his father is extinct, and he is now free.

The Lords found the father liable, (notwithstanding of those words, *In respect of his minority,)* as *expromissor et correus debendi*, since he, his heirs and executors, were bound.

This deserves consideration; for the clause neither bore that he and his son were bound conjunctly and severally, nor that they became obliged with one consent and assent. But it seems the Lords thought it unfavourable to evacuate the obligement for a woman's jointure of 13,000 merks, who brought 9,000 merks of it in tocher with her; and the Lords went upon the design and meaning of the parties. *Vol. I. Page* 64.

1679. *November* 19.—In the cause Keir and Wemyss against Fergusson, (*vide* 14th Nov. last,) the defender further ALLEGED he had satisfied the obligement, in so far as he had already employed the money for her liferent. ANSWERED,—It is not in responsal hands. REPLIED,—They were then responsal.

This being reported, the Lords found, that it was not enough that the parties in whose hands the money was lodged for her liferent use, at the time of the first employment by her husband, which was in 1670, were then responsal unless she had accepted, or consented, or homologated it since her husband's decease; or that they are still sufficient and able; seeing the time her husband

lived she was *non valens agere, et actio ei non competebat nec nascebatur* till after his decease. See *3d Nov.* 1677, *Cuthbert.*

The Lords are most favourable to women's jointures. *Interest reipublicæ mulieres dotes salvas habere,—l. 1 et 2 D. de Jure Dot. and l. 1. D. Solut. Matrim.* See *8th Jan.* 1680, *Rie.* *Vol. I. Page* 65.

1679. *December* 9.—David Fergusson, as tutor to his grand-children, craving that Sarah Keir, his daughter-in-law, and their mother, may be decerned to deliver them up to be kept by him; as also, to modify an aliment to them of their mother's jointure. ANSWERED,—There was a civil process depending betwixt them before the Lords, for recovering her jointure. (*Vide* 14th Nov.)

The Lords referred it to the civil judge, to be summarily discussed; and superseded to determine an aliment, till the event of the said civil process did make it appear what means and estate the children had, unliferented by their mother or goodsire. *Vide infra*, 11th Feb. 1680. *Vol. I. Page* 68.

1680. *January* 20.—In the action between John Wemyss and David Fergusson, (19th Nov. 1679;) where an arrestment is laid on upon a decreet or registrate bond, which is suspended, the Lords do now commonly upon a bill loose the arrestment upon caution, as if it had been originally laid on upon a dependance, and this they never refuse now; as also, if the arrestment lie over six months without raising a pursuit on it, they will loose it upon caution. *Vol. I. Page* 76.

1680. *February* 11.—The case David Fergusson against Wemyss (9th Dec. 1679,) being reported; the Lords found the defence proponed by the mother against the aliment craved by her children from her, *viz.* that she liferented little more than her own tocher, not relevant, unless she offer to prove there is an estate sufficient to aliment the minor, over and above the estate liferented by her. But they allow the mother the custody of her son till he be of the age of seven years, as also the custody of the daughter till she be of that age. *Vide Aug.* 10, 1680, *Home; Ann. Robert. Rer. Judicat. lib.* 1, *c.* 8,—where the Parliament of Paris adjudges the education of the child to the mother, though she be married. *Vol. I. Page* 84.

1682. *November* 8.—David Ferguson, as tutor to his grand-children, pursuing Sarah Keir, their mother, and John Wemyss now her husband, for the moveable heirship intromitted with by her, (*vide* 14th Nov. 1679;) she craved absolvitor, because, by a clause in her contract matrimonial with David's son, she is assigned to all the moveables of the house, the time of her husband's decease, if she should survive him. ANSWERED,—This is to be understood *sano sensu*, and not of heirship, seeing it is not expressed.

Yet the Lords found moveables, in the general, comprehended heirship as well as other moveables; and therefore assoilyied her. *Vol. I. Page* 193.

1682. *November* 8. CATHARINE M'KAY, Petitioner.

CATHARINE Mackay being to be served heir to her father, in some lands in Argyleshire; because there was no Sheriff there to give her infeftment, the Lords, by their deliverance on a bill, ordained the Director of the Chancery to

issue brieves to the Commissary of Argyle, to supply the Sheriff's place. *Quær.* if it must be under the quarter seal. The macers would have been more proper to the service: but that way was dearer than to do it at home.

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1672 *and* 1682. SIR ROBERT MURRAY *alias* CRIGHTON, *against* RICHARD MURRAY of BROUGHTON.

1672. *February* 6.—IN the improbation pursued by Sir Robert Murray, *alias* Crighton, against Sir Richard Murray of Brughton, of a lease and release of lands in Ireland, pretended given to him by the late Earl of Annandale; the Lords found themselves judges competent, though the subject matter of the debate lay without their jurisdiction, *viz.* lands in Ireland, because the parties were both Scotsmen, and the deed was pretended to have been done in Scotland before Scots witnesses; and granted certification against the writs craved to be improven, if he produced them not betwixt and the 25th of this month. But,—because he alleged that this very lease having been quarrelled by this pursuer before the Judges in Ireland after trial there taken of its falsehood, it was found by an inquest to be a true deed, and so being *res judicata* there, it can never be more called in question here;—The Lords declared they would stop the certification, if, betwixt and the said day, he produced to them sufficient documents instructing that it was *res hactenus judicata* by the Courts of Common Pleas and Chancery in Ireland. See the large informations of it.—See thir parties, *24th July* 1678.

Forum est competens, vel ratione originis domicilii, rei sitæ, loci contractus, vel delicti. *Advocates' MS. No.* 318, *folio* 128.

[See the intermediate parts of the Report of this case Dictionary, page 4807.]

1682. *November* 9.—In Murray of Broughton's case with Sir Robert Creighton, (mentioned at the end of February 1680, No. 18, p. 348;) the Lords having advised the probation, found that Broughton, in June 1663, was not in Ireland; but, by the records of Parliament, being then a member, he was at Edinburgh; though it was proven he was in Ireland in May 1663; and so found his contumacy not purged. Though he was not then the nearest heir of tailyie to Annandale, a sister being alive: but he was holden as confessed on other passive titles libelled, as vitious intromitter, &c. and so they decerned; but a third party cannot use this as a probation against him.

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[See the subsequent parts of the Report of this case, Dictionary, page 4808.]

1682. JANET ALISON *against* CAPTAIN ALISON and MR GEORGE STEILL, Minister at Prestonhaugh.

March 10.—THE Lords, on Redford's report, ordain Captain Alison, be-

twixt and the 20th of March, after consideration of the defunct's condition, to determine the legacy to be paid by the executor to the said Janet, pursuer, the defunct's sister; and that at the sight of the Lord Reporter; in regard the defunct, by his testament, hath left the nomination of the quantity of it to the said Captain; wherein if he fail, (he being required, by a notary and instrument, to do it,) that the will of the dead may not be rendered ineffectual, they recommend to the Lord Reporter, *ex religione boni viri*, after hearing of the parties, and considering the condition of the defunct's fortune and estate, (whereof we gave in a condescendance,) to modify and determine these legacies.

Some alleged the legacy was extinct and void, the Captain refusing to give his determination: but that is contrary to *lex* 1. *D. legat.* 2, where a legacy *in arbitrium tertii collatum* is valid, though he do not arbitrate. It is true, *emptio ita in alterius arbitrium collata non valet.* *Vol. I. Page* 178.

1682. *November* 10.—In the action pursued by Janet Alison, mentioned 10th March 1682; the Lord Redford, being allowed to modify her legacy, after consideration of the defunct's estate, and the inventary of the testament and his count-book, amounting in all to £16,000 Scots, and the condition of the family, being only himself and a wife; he divided in two halfs, and modified to her the half of the dead's half, *viz.* £4000 Scots, she being his sister, and without deduction of a proportional part of the debt if condescended on; and ordained her to take a share of good and bad in the inventary, with as much equality as might be. *Vol. I. Page* 194.

1678 *and* 1682. ALEXANDER HOME of LINTHILL *against* ALEXANDER AITKENHEAD and ANDREW MUNRO.

1678. *November* 12.—Linthill's father was commissary of the Merse or Berwickshire. Major-general Monro lying there with his regiment, he got a precept from the Estates, drawn upon Linthill's father, for the sum of . He accepts it, and gives him a part of it in money, and grants his bond, or ticket, for £1400, which was the remainder thereof, with this quality, that he should pay it, if he got that precept allowed to him when he came to make up his accounts with the public. *Ita est*, he accordingly got it allowed.

The Lords found Linthill's father's accepting of the public's precept, and getting it allowed, equivalent to payment for an equivalent debt owing to him, though he never got payment thereby; and also decerned in the annualrents since the payment, in regard of his declaration, that, how soon he got payment thereof, he should account for the same: only, because, by the balance of the account, Linthill's father was found super-expended, they allowed him to retain a part proportionally and *pro rata* effeiring to the other articles of the account, (which will deduce about £200 Scots off the foresaid bond.)

Sir G. Lockhart, in his information for Linthill, used thir words:—It is a wonder to astonishment, that such an umbratile, fictitious, imaginary, and stramineous kind of payment as what is inferred by accepting a precept, shall not only have the force of a real solution, but also infer an obligation upon the acceptor

for payment of annualrents, when there was none stipulated, and neither *lex* nor *pactum* for annualrents.

Of this decision, as of many others, all the reason that can be given is, *quod sic visum est superis. Vide infra, 15th Nov.* 1682. *Vol. I. Page* 19.

1682. *November* 15.—Between Alexander Home of Linthill, and Mr Alexander Aitkenhead, and Monro, (mentioned 12th of November 1678;) the Lords, after a long debate, religiously adhered to their former decreet *in foro;* and found all now proponed either formerly proponed and repelled, or else then competent and omitted; and so repelled it, and refused to reduce their decreet, unless they condescended on nullities, informalities, or trinqueting in false extracting. *Vide 8th Dec.* 1682, *Paton.* Yet see the contrary done for the *Marquis of Queensberry, 20th Dec.* 1682. *Vol. I. Page* 195.

1682. *November* 16. Sir John Nisbet of Dirleton and Sir John Seton of Garmilton *against* Andrew Marjoribanks, &c.

Sir John Nisbet of Dirleton, and Sir John Seton of Garmilton, as creditors to Mr Andrew Marjoribanks, pursue a reduction, against him and his children, of a disposition he had made, giving them the fee of his lands, and declaring their succeeding or meddling should infer no behaviour, or passive title on them.

The Lords reduced it as fraudulent. *Vol. I. Page* 195.

1682. *November* 21. William Gairden and Sir James Keith *against* Irvine of Drum.

In the competition arising on the process of maills and duties pursued by Mr William Gairden, minister in Edinburgh, and Sir James Keith his cedent, between them and Irvine of Drum; the Lords, upon Castlehill's report, brought in Keith's comprising *pari passu* with Jousse's which Drum had acquired in; because, though it was neither within the year and day before nor after it, yet they found it sufficient that it was deduced and led before the first effectual comprising, and its priority in date before the first said effectual apprising ought at least to give it the privilege of *pari passu* with that whereon charge and infeftment had been first taken.

This has been oft so decided. And they found Gairden and Keith were not instantly obliged to pay down their proportional parts of the expenses of the said preferable apprising and its infeftment, ere they could have the benefit of coming in *pari passu* with it; but that they might allow the said preferable appriser to possess and uplift the maills and duties aye and until he were paid of these charges and debursements; and then, after that, brought them in *pari*

passu for the remnant: but if Drum would not possess, then they preferred Gairden, he paying Drum his expenses out of the first end of his intromission.

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1682. *Nov.* 29. EUPHAME SETON, Lady Kirklands, *against* THOMAS BUTTER.

EUPHAME Seton, Lady Kirklands' action against Thomas Butter, tutor to her son, and executor to her husband, being reported by Castlehill; the Lords preferred the relict pursuer to her husband's creditors, not only *quoad* the funeral expenses, which is uncontroverted in law; but also for her mournings, he being of that rank and quality that his wife might wear them. *2do*, For the servant's fees. *3tio*, For the entertaining the family to the next term after his death; and *4to*, For the expenses of her in-lying of a posthumous child, though the same fell to be after the term immediately subsequent to his decease, and so fell when she was entered to her own jointure.

Which last they had decided before, in 1675, in Agnes Wilkie's case against Morison; but *quær.* if under this she may claim the expense of the child's nurse's fee. And the Lords having remitted to Castlehill the auditor to consider the accounts given in by the relict, and to modify the same as he saw just; upon his report they modified to her 900 merks; she allowing, in the first end of it, what provisions she had in the house at the time of her husband's death, and any victual she received either then or since, providing it was not in payment of her jointure; and they found both the aliment to the term due, and that term due for her jointure, seeing she might lose a term by her dying before Whitsunday or Martinmas.

I find the Lords have allowed relicts' mournings even where the husband has died *obæratus* with more debt than their estate could pay; as in the case of Lady Kincardine and Lady Boggie.

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1682. *November* 29. SIR ANDREW DICK *against* ROBERT DEANS.

THIS was an advocation from the Commissaries of Edinburgh, where Sir Andrew pursued Mr Robert Deans for slandering him, and stealing away and murdering his good name and reputation, by calling him a *belted, i. e.* in one sense, a whipped knight, for stealing some Scots records out of the Tower of London, the time of Oliver Cromwell's usurpation. Mr Robert's reasons of advocation were: 1*mo*, He was a member of the Session; *2do*, the Commissaries had committed iniquity in sustaining process, after he had debarred Sir Andrew Dick with horning.

ANSWERED,—The first was a declinator; and was not competent now, after he had proponed peremptors. *Item*, The privilege of advocates was only in civil cases, but not in slanders, where the Commissaries, as *judices Christianitatis*, were only competent *in prima instantia privativè* of the Lords aye till they had

pronounced sentence, by imposing a fine, and the usual censure of standing at the church door and recanting. To the *second*, The Commissaries did no wrong; for though they repelled Sir Andrew *ab agendo*, yet, *ne delicta maneant impunita*, they sustained process *ad interesse publicum* at their procurator fiscal's instance.

The Lords heard the two parties scold a while upon one another, in their own presence, for their diversion. *Vol. I. Page* 197.

1682. *November* 30. JOHN LIDDEL *against* LAW.

JOHN Liddel, minister at Scoon, pursues an action against one Law, for £1000 Scots contained in a bond granted by Law, his wife's former husband.

The Lords, on Forret's report, reduced the bond, and found it satisfied, on this inartificial and conjectural probation; 1*mo*, That it appeared, by the pursuer's oath, that the cause of the granting it was in lieu, contemplation, and recompense of her moveables and plenishing she brought with her; (though the bond in its narrative did not bear this cause;) and that the husband's children were forced to give her back again all these moveables, and she evicted them from them, because the marriage betwixt that husband and her had dissolved before year and day, without children, and so the bond was *causa data causa non secuta*. 2*do*, That the cause of the bond being merely gratuitous, and his whole estate being but 2000 merks, he could not give away £1000 of it to his wife, in prejudice of his children their legitim.

The Lords sustained thir two reasons of reduction; and found them proven, and so on pregnant presumptions took away this bond. *Vide* a similar case, 15*th Dec.* 1681, *Mercer*. *Vol. I. Page* 198.

1682. CORNELIUS NIELSON *against* JAMES BONNAR'S HEIRS.

January 11.—THE case betwixt Cornelius Nielson, merchant in Edinburgh, and the heirs of James Bonnar, upon the circumvention, was debated, wherein the lawyers expatiated learnedly on *dolus incidens et dolus dans causam contractui;* which being mistaken by some, has made me set down their definitions here.

Joan. Bockelmannus, in his learned *Compendium Institut. tit. De Actionibus, p.* 246, defines *dolum dantem causam contractui, quo quis inducitur ad contrahendum qui alias contracturus non fuisset; dolus vero incidens dicitur, non quo incidit in contractum, sed quo aliquis circa contractus incidentia decipitur; veluti cum vilius vendit et carius emit.*

Struvius, *in Syntagm. Juris, vol.* 1, *p.* 257, defines them from Cæsar Borgalius, *de Dolo*, thus: *Dolum incidentem esse, quando quis omnino, sua sponte, alterius calliditate non inductus, contrahit, et in re de qua initur conventio, (v. g. circa rei valorem, qualitatem, &c.) seu in modo contrahendi, fraudulenter decipi-*

tur ; and therefore it does not annul the contract *ipso jure,* but only produces an action *ad damnum resarciendum.*

Dolus incidens being no more but extreme lesion, though even *ultra dimidium justi pretii, ex l. 2* C. *de Resc. Vendit.* if it be only eventual, and not *dolus dans causam,* does not in our law annul the contract, or reduce it; and was so found, Dury, *4th July* 1635, *Monymusk. Vide infra,* 24th March 1682, *Stewart ;* and 7th December 1682, thir same parties. *Vol. I. Page* 169.

1682. *December 5,* 6, and 7.—Between Cornelius Nielson, late bailie in Edinburgh, and James Bonar's heirs, (*vide* 11th January 1682 ;) the Lords, having advised the probations, assoilyied Cornelius from the reduction *ex capite fraudis et circumventionis ;* and, without determining whether *pactum corvinum super hæreditate viventis* be valid with us or reprobated, (see Dury, *6th July* 1630, *Aitkenhead,* where the paction is allowed,) they sustained the disposition to Nielson, in regard of the ratification made of it after James Bonar's death : though it was alleged, against this ratification, that it was a part of the cheat ; and that Ballantyne was taken sworn not to seek advice, nor discover it ; and so he was fraudulently bound up ; and the ratification is dated before Bonar was buried, and so was *nimia et præpropera diligentia.* Yet the Lords, who were for assoilyieing Nielson, said, that George Dallas the writer, and the witnesses, (but it was objected against them, that they got a part of the prey,) deponed, that the thing was deliberately done, and read to them ; and argued, that weakness and levity of mind does not hinder men from disponing their rights, unless they were either interdicted, or declared idiots, or on death-bed. Yet some thought, that such a simplicity as this ought to be like a minority, to repone them when they are lesed.

This being decided in the afternoon, the Chancellor, and some Lords, then absent, got it stopped the next day ; and urged a review and reconsideration of the affair ; and so they having resumed it on the 7th of December 1682, the Lords quite altered their interlocutor ; and it was found a mere circumvention and cheat ; and therefore reduced it, and restored the parties to their own rights, notwithstanding of the ratification.

For all the Lords were convinced of an unhandsome machination and design ; but some of them thought it was not such as was reparable in law, *in foro humano ;* and they were now so displeased with Cornelius Nielson's carriage in it, that the king's advocate got an allowance and warrant from the Lords, to pursue him criminally before the Secret Council for it ; as also, for seeking a sight of a bond for £1000 Scots he was owing to umquhile James Bonar, and throwing it in the fire, and burning it at his own hand, pretending that the defunct, knowing it to be paid, had allowed him to cancel it. As this discourages cheats, so it will, on the other hand, render persons afraid to bargain, meddle or transact with needy people, who, without any modesty, though they have got the full value, will clamour they are cheated.

Some contended that the ratification was null, because a cheat cannot be ratified ; and *non entis nulla sunt accidentia ;* but others cited an excellent law, *l.* 78, § *ult. D. ad S. C. Trebellian.,* where a cheat as ill as this may be transacted ; for *dolus futurus tantum, non præteritus, nequit transigi.*

But there was a great tract, series, and concatenation of knavery here ; and Sir George Lockhart asserted, that, in all the instances of the lawyers he had

read, he had not found so pregnant an example of a contrived and complicated cheat as this was. *Vol. I. Page* 199.

1682. *December* 8. WILLIAM PATON *against* STIRLING of ARDOCH.

WILLIAM Paton, writer, against Stirling of Ardoch, is reported by Forret. The Lords, notwithstanding all the objections against the decreet *in foro*, did religiously adhere thereto, and would not loose the same. *Vol. I. Page* 200.

1682. *December* 13. THOMAS WILSON *against* JOHN and JAMES MUIRS.

THE case between Thomas Wilson and John and James Muirs, is reported by Drumcairn. The Lords, in regard he was holden as confessed, refused to repone him presently; but found the letters orderly proceeded, superseding extract for eight days, to see, if, in a reduction to be raised by Muirs, they could purge their contumacy. *Vol. I. Page* 200.

1682. *December* 21. SIR JAMES TURNER *against* JAMES PILLANS.

THE competition between Sir James Turner and Mr Pillans about the lands of Craig, being reported by Boyn; the Lords found that Mr James, though a compriser within year and day, yet ought not to come in *pari passu* to a share of the maills and duties with Sir James; because Mr James, having intromitted already, had got part of his annualrents, whereas Sir James had got none: and therefore allowed him to possess till he were as far forward as Mr Pillans was: and then allowed them after that to come in *pari passu*.

This was reclaimed against by Mr Pillans, (who had not spread his informations before reporting,) as not the equality meant by the 62d Act Parliament 1621, seeing *vigilantibus jura subveniunt*; and all that Sir James could claim was by an action to repeat his proportion; and, even in that case, he would defend himself that he was a *bona fide* possessor, as the Lords found in 1675, *Baird and Johnston*.

But the bill was refused 15th March 1683, and the Lords adhered to their former interlocutor. *Vol. I. Page* 203.

1682. JAMES PILLANS *against* DAVID PLENDERLEITH and ANDREW BURN.

January 24.—THE competition between Mr James Pillans, late one of the Regents of the College of Edinburgh, and David Plenderleith, writer, being reported by Tarbet, Lord Register; the Lords found, that David Plender-

leith being creditor to Hepburn of Craig, the common debtor, the time of the leading his comprising, in other sums of money besides those contained in his comprising, that he, with consent of the said common debtor, might afterwards, in a stated account betwixt them, apply his intromissions to the payment of these other sums, albeit these other sums were not due to him the time he got the assignation to the maills and duties; and that the comprising is neither null nor extinct thereby, but that the said second apprising does stand; and the order used thereupon is good for purging Pillans's first apprising, in all sums standing in Pillans's person; and therefore ordain Pillans to count and reckon.

This seemed a hard decision; but was to maintain diligence led.

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December 21.—David Plenderleith, writer, against the above mentioned Mr James Pillans, (*vide* 24th January 1682,) and Andrew Burn, tenant in Craig; the Lords, on Saline's report, did repone Mr James, and Burn the tenant, against the decreet which David had taken out against them on circumduction, in regard they on a bill had been reponed against that circumduction, and had offered themselves, by way of instrument, ready to depone. But, as to the steelbow, found it was not so much *pars fundi instructi* as to belong to an appriser; who had indeed right to all the maills and duties, the corns and silver-rent, payable by the tenants, but not to the straw so long as his legal was not expired; but that the same was moveable.

But this point may very well be debated, why the straw should rather follow the ground.

And the Lords found Craig the debtor, during the running of the apprisings against him, might dispose the said straw to David Plenderleith, and that he as assignee had right thereto, and not the apprisers: but, in regard Burn the tenant was out of the ground, and had left the straw to the entrant tenant, they assoilyied him; and found, since it was the straw of the crop 1676, that Mr Pillans, or any other intromitter with that year's rent, ought not to be liable for the said steelbow, in so far at least as the rent was meliorated and improven the following years, by having so much steelbow straw upon the ground; which if the tenant had wanted, he could not have paid so great a rent.

But it being represented, that they who uplifted the rent 1676 got not the straw, but it remained still with the tenant; therefore Saline inclined to decern the assignee David Plenderleith to get the straw of this last crop 1682, as, by progress from year to year, surrogated and come in place of the straw crop 1676 *specifice* disponed to him. *Vol. I. Page* 208.

1682. *December* 22. David Christy *against* James Christy.

The debate between David and James Christies was this day advised; but the Lords being much divided, they superseded to give answer on it, till some farther points were debated.

The case was:—When Mr James Christy died, he left only a daughter, whom he named his executor and universal legatar; and, failing of her, he leaves 3,000 merks to David Christy, his cousin, a part of whose means Mr James's father had got. He did not consider his wife might be with child; but she,

eight months after his death, brings furth a son; and, the daughter being dead, they now refuse to pay David the 3,000 merks, because, *ex agnatione et supervenientia illius postumi, rumpitur, dissolvitur, et evanescit substitutio pupilaris, ex præsumpta defuncti patris voluntate*, that, if he had considered his wife would bring him furth a son, he would never have burdened him with this legacy. And they founded this on Papinian's conjecture, *in Lege* 102 *D. de Condit. Institut. l.* 30 *C. de Fideicom. l.* 6 *C. de Institut. et Subst.*, and the famed *l.* 8 *C. de Revoc. Don.* And though Accursius, &c. restrict that law to the precise case of *patronus et libertus*, yet Cujacius, *lib.* 20, *observat. c.* 5, extends it to all.

David Christy ALLEGED, The father's express will must preponder, and cannot be everted by conjectures, else you may arbitrarily make up defuncts' testaments; and this son had no right to moveables, because he succeeds to an opulent heritable estate, and his sister excluded him *in mobilibus;* and Mr James had good reason to leave David this legacy, because his father had got much of his means by a comprising led against David's father. And they cited for them *Leg. ult. D. de Hæred. Institut.*, and urged that the liberty of revoking a donation, *ob supervenientiam liberorum*, was, *per dict. l.* 8, only competent to the donatar himself, but not to his heir. *Vide* Papon's Arrests, *lib.* 11, *tit.* 1, *num.* 19; and St Augustine's excellent verdict on this case, in the Canon law, *Caus.* 17, *Quæst.* 4, *Canone* 43 *seu ultimo.* *Vol. I. Page* 204.

1680 *and* 1682. ARCHIBALD WILLIAMSON *against* The BAILIES of HAMILTON.

1680. *July* 28.—ARCHIBALD Williamson pursues, by the subsidiary action, the Bailies of Hamilton to pay the sum of , because they suffered Mr John Baillie of Carphin to escape out of their prison.

The Lords repelled the magistrates their whole defence, *viz.* That he was incarcerated by a collusion, and merely upon a design, in so far as Carphin, the rebel, being both sheriff-depute and bailie of the regality there, he had as much power and command over the jailer and prison of Hamilton as the bailies themselves had; and that he staid not half an hour there, but came forth with the messenger again; and they could have apprehended him since, if the same had been intimated to them; and he afterwards died prisoner in the tolbooth of Glasgow; and, if it had been any thing but a mere trepan to ensnare the magistrates, and get them for debtors, they might have taken him to many surer prisons at no great distance. And found it relevant to make the magistrates liable, *in solidum*, for the debt—(but it is thought it will divide in equal halves betwixt the two magistrates,)—that the rebel was incarcerated, or delivered to them to be incarcerated; and repelled the reasons.

This the Lords did, lest they should open too large a door for permitting the escape of prisoners. But it would appear, by the words of this interlocutor, that the Lords have not found that the messenger's execution, bearing, that he delivered such a rebel prisoner to the magistrates, and they accepted of him; or the notary's instrument, bearing, that the prisoner was required, and was not found,—do prove the same.

And I think, as in other instruments, for astructing the truth thereof, the witnesses inserted ought to be adduced. See *23d November* 1680.

Vol. I. Page 110.

1680. *November* 23.—The Lords found the messenger's execution, bearing, that Mr John Baillie was imprisoned, and the notary's instrument requiring him, and bearing, that he was not there, but at liberty, ought to be proven by the witnesses inserted. Though, in citations, and some other cases, messengers' executions are probative *per se*, without the witnesses adminiculating them.

Some pretended, the messenger and notary ought not to be admitted, because they had behaved themselves as partial, in giving it under their hands already.

The words of the interlocutor were :—Find the pursuer must yet prove that the debtor was incarcerated, or delivered to be incarcerated.

Vol. I. Page 117.

1682. *December* 23.—Archibald Williamson, merchant in Edinburgh, against the Bailies of Hamilton, (*vide* 23d Nov. 1680,) for suffering Bailie of Carphin to escape out of their prison :

It being further ALLEGED, That they could not be liable for his escape, because they were only a burgh of barony, and the prison of the regality of Hamilton was kept elsewhere ; and, by decisions in Dury, 12*th Feb.* 1624, *Lanton* against *The Bailies of Dunse*, burghs of baronies were not bound to keep prisoners ; and the 27 3d Act of Parliament, 1597, does not oblige them to it.

The Lords repelled this, in respect it was offered to be proven that messengers were in use to incarcerate prisoners there, and that the bailies of Hamilton were in use to receive them. *Vol. I. Page* 204.

1682 *and* 1683. PATRICK REID *against* THOMAS CRAWFORD.

1682. *December* 5.—BETWEEN Mr Patrick Reid and Bailie Thomas Crawford ; the Lords having heard Saline report the debate, they sustain the reason of compensation ; and find the debts and the grounds thereof are not to be presumed paid, albeit, by a posterior back-bond, Bailie Crawfurd has not provided for the security of these debts, as he did for the debt of Kincaid of Warriston ; and sustain that article of the libel anent the sum of contained in the fitted account ; and refuse to sustain the five years' salary to Hugh Crawfurd, Thomas's brother, in respect the balance is of free profit, and these salaries use to be weekly allowed ; and repel the discharge of Hunter *adjectus solutioni*, in respect Mr Patrick offers to prove that the same was granted and impetrated since the intenting of Mr Patrick's action. *Vide 3d Jan.* 1683.

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1683. *January* 3.—Mr Patrick Reid having given in a bill against the interlocutor mentioned 5th Dec. 1682 ; the Lords, having considered the bill and answers, adhered to their former interlocutor, anddeclared, if he reclaimed by any new bill, they would modify large expenses against him.

His great importunity provoked them. *Vol. I. Page* 204.

1682 *and* 1683. JAMES RAE *against* GIBSON and NOBLE.

1682. *February* 24.—THE Lords, on a bill given in by James Rae, merchant in Glasgow, who had taken the first of November, 1682, to prove an allegeance, that he had plied the voyage, against Gibson and Noble; but, in regard the witnesses he was to adduce were seamen, now abroad, and who might come to Scotland during the ensuing long vacancy, and be gone away before the first of November next:

Therefore the Lords allowed a commission to the Commissary of Glasgow, or , to examine them any time in the vacancy, when they returned; eight days' intimation being given by a notary to Gibson and Noble to attend their examination. *Vol. I. Page* 176.

1683. *January* 4.—James Rae, in Glasgow, against Gibson and Noble, (as mentioned 24th Feb. 1682.) The Lords found, since the merchants had not filled the vessel with victual, that the skipper, in place of his portage, might put in a small quantity on his own account; and that this could not prejudge the merchants by underselling them and lowering the markets, he having only eight or ten bolls; and, in regard that they had maliciously put the skipper to a probation that he had plied the voyage, and that the freight was £46 sterling, they modified £4 sterling further of expenses.

Quæritur if this be over and above the penalty of the charter-party.

Vol. I. Page 204.

1683. *January* 9. LADY BUCHANAN *against* The MARQUIS of MONTROSE.

THE case between Lady Buchanan and the Marquis of Montrose being reported by Harcus; the Lords found that the park of Dalsennock controverted was not comprehended in the Lady's liferent provision, and that therefore any intromission the Lady hath had therewith, or rents thereof, must be ascribed in payment of her liferent provision *pro tanto*. And, as to the Lady's intromission with moveables, steelbow goods, and others belonging to her husband; before answer, ordained the defender to give in a particular condescendance thereof, and how they will prove the same. And, as for the exhibition, they found the Lady and her daughter ought not only to have exhibition of the writs, made by Buchanan to Major Grant, and by Major Grant to the Marquis, but likewise the writs of all lands whereof the pursuer has the reversion, and as Major Grant had the writs before he disponed that estate to the Marquis.

Vol. I. Page 205.

1683. *January* 11. ROBERT RALSTON *against* MARION WEIR.

ROBERT Ralston,—as having right from James Weir in Hamilton, by an heritable bond, to some tenements there, for security of 1200 merks he had lent him, and as adjudger of them,—pursues a reduction, against Marion Weir, his sister,

of an irredeemable disposition she had got of these lands just two days before his heritable bond, as fraudulent, on the Act of Parliament 1621.

ANSWERED,—This case falls not under the compass of that Act, which allows only anterior crēditors to quarrel dispositions made by their debtors, as the *actio Pauliana* also did.

REPLIED,—In extraordinary cases, even posterior creditors are allowed, as in *Street* and *Jackson's* case against *Mason*, in 1673, because of the tract of the correspondence betwixt them. *2do*, He must be reputed here an anterior creditor; because Weir, during his very communing to borrow Ralston's money, gives this disposition only two days before; and, *ex propinquitate temporis, præsumitur dolus atque animus fraudandi.* *3tio*, The disposition bears only love and favour, and a declaration that it should be null if ever he returned home.

Kemney reduced the disposition *ex capite fraudis et circumventionis*, and, in respect of the qualities it bore, whereby it still remained to be *in potestate et bonis debitoris;* but, they craving the Lords' answer, the Lords, on this day, reduced the said disposition. *Vol. I. Page* 206.

1683. *January* 11. LORD HALTON *against* The TOWN of DUNDEE.

See the prior part of this case, *supra*, page 352.

THE debate betwixt the Town of Dundee and my Lord Halton, now Lauderdale, anent the patronage and presentation of the second minister there, being reported; the Lords preferred the Town's right upon their dotation, former presentations, and possession. Notwithstanding, he was patron of the parson; and the contrary seemed to be decided on the 18*th* of *November* 1680, for the *Earl of Haddington* against *The Town of Haddington.* But they differenced the cases: for the Town of Haddington's possession was not so pregnant and clear. *Vol. I. Page* 206.

1681 *and* 1683. SIR ALEXANDER FORBES of TOLQUHON *against* DALGARD, Relict of William Johnston.

1681. *July* 14.—THE Lords, on Pitmedden's report, found the new transaction, made by her husband, (wherein she was not a consenter,) could not take away her right by the first minute, which provided her to so much of the money in liferent.

In the same process, the Lords sustained the allegeance of competent and omitted as relevant against Tolquhon: though it was ALLEGED, 1*mo*, It was only omitted in a suspension. *2do*, Tolquhon offered to depone it was *noviter veniens ad memoriam*, since the discussing of that first suspension; for, though he had the writ lying beside him, yet he had forgot it.

This the Lords also repelled: and made a distinction between *noviter veniens ad notitiam, et ad memoriam;* and found this last not enough, *in facto proprio*, to repone him; and that law only knew the first, but not the second.

Vol. I. Page 147.

1683. *January* 16.—The case between Sir Alexander Forbes of Tolquhon, Dalgard, and Johnston, (*vide* 14th July 1681,) being heard in presence; the Lords found the letters orderly proceeded against Tolquhon, in respect of the two decreets *in foro*, and his bond of corroboration following thereon; though he was in prison when he granted that bond, and though the charger's husband had not fulfilled his part of the minute of contract; but, in regard he found his own inability to do it, he had discharged it. But she was not a consenter, and it did not appear she had any other provision, otherwise it would have been *donatio inter virum et uxorem*, and *tacite* revoked by his discharge.

Vol. I. Page 206.

1683. *January* 17. MARY and ——— MAXWELLS, Daughters to Drumcoltran, *against* IRVINE and CARLYLES.

THE Lords, on Saline's report, modified twelve bolls of victual to the pursuers, for the year 1682, as an aliment which their father was in possession of during his lifetime, as the excrescent duties of the lands more than paid Irvine the annualrent of his wadset money. But the Lords declared, if the said two pursuers did not bring their count and reckoning to a close within a twelvemonth, they would not continue the said aliment to them any longer.

Then it was controverted, whether the boll should be Linlithgow measure, which is the common standard for the whole kingdom; or Galloway, where the wadset lands lie, and is much larger than the Linlithgow.—It will clear it much, which of the two was paid to their father. *Vol. I. Page* 207.

1683. *January* 19. WILLIAM CLERK and EDWARD WRIGHT *against* The EARL of ANNANDALE.

MR William Clerk, and Mr Edward Wright, advocates, as having right to Ruthven of Gairden's wadset on the Earl of Home's estate, pursue this Earl of Annandale, as representing his good-sire, cautioner in that wadset.

The Lords, upon Nairn's report, find Tillibairden and John Elies's comprisings, now purchased in by Annandale, null, as led for some annualrents, now instructed to have been paid before the leading it. But, in regard of the pursuer's consent, they sustained and allowed the same *quoad* principal, annualrents, and true debursed expenses.

A bill having been given in by Annandale against this; the Lords having considered it with Mr Clerk's answers and condescendance, they, on the 27th of January 1683, adhered to their former interlocutor, except as to the first article; they sustain the Earl of Tillibairden's apprising, not only as to the principal sums in the bonds, and their annualrents, but also as to the necessary debursed expenses; but they refused to allow compensation against Elies's comprising for the £480 received by Alexander Lessley, his cedent, to be given to auditor Thomson or Troutback, and the other receipts granted by Alexander Lesley; except Clerk, the pursuer, will offer to instruct that these tickets and

receipts were extant and seen, (they wanting writer's name and witnesses, and appearing to be holograph,) before the intimation of Alexander Lesley's assignation, made to John Elies the appriser. Which the pursuer offering to prove, they allow the same term to the defender to prove that the £480 were accordingly delivered to Thomson or Troutback, and Jerdane's bond retired in the terms of the receipt; as likewise, to prove that the 500 merks to Pennicook, and Jerdane's bond retired from him in the terms of the ticket: and remit to my Lord Pitmedden, (in respect of Nairn, the former auditor's infirmity,) to see the calcul of the balance adjusted; as also, to hear the parties upon any thing farther they have to say, not already debated and determined by former minutes. *Vol. I. Page* 208.

1683. *January* 20. MAXWELL of NETHERYETT *against* STEWART of SHAMBELLY.

MAXWELL of Netheryett's probation against Stewart of Shambelly being advised; the Lords found Shambelly had contravened the 158th Act, Parl. 1584, in beating and invading Netheryett, during the dependance of the plea betwixt them, and so had lost the cause.

Notwithstanding it was ALLEGED for Shambelly,—That the Act of Parliament meant only invasion to the effusion of blood; which was not here, but only a dry cuff. *2do*, That it was only such hurting as might be the ground of a criminal process; which this was not. *3tio*, Though it were, yet self-defence should excuse, he being provoked; and Netheryet being the aggressor, with a false caption, which he did of purpose to provoke, knowing Shambelly's passion; and so, *ex suo dolo non debet lucrari*. *4to*, That there were several compensations already sustained, and other points decided in the cause, as to which Shambelly could not lose these but only the points standing yet undetermined.

All which the Lords repelled; and decerned against him in the whole cause, because they found the Acts of Parliament very strict. *Vol. I. Page* 212.

1682 *and* 1683. ANDREW CASSIE, Slater, *against* JOHN WILKIE and JAMES BROADFOOT.

1682. *February* 11.—THE Lords assoilyied Wilkie from Cassie's action of damage, (qualified thus, that, by Wilkie's building up his new land in the fore street of Edinburgh, his shops near adjacent were incommoded;) seeing he behoved to lay his rubbish and materials on the street, when he was rebuilding; and the neighbours' prejudice thereby was both casual and necessary, and no ways *in æmulationem vicini; et qui jure suo utitur alteri injuriam facere non videtur*. *Vol. I. Page* 173.

1683. *January* 20.—The Lords,—having considered the report of the masons upon oath, to whom the consideration and visitation of the chimney was

referred,—found the damage and prejudice libelled to have been done by narrowing his chimney in rebuilding John Wilkie's land, not to be proven; and therefore assoilyied. *Vol. I. Page 212.*

1682 *and* 1683. CAPTAIN HOME of FOORD *against* JAMES STEWART and his MOTHER.

1682. *December* 15.—THE Lords, on Boyn's report, found the pursuer's general service was a sufficient title to give him right to a reversion of a wadset, though his father died infeft; and that this wadset was not of that nature, as, by the 62d Act of Parliament 1661, they were bound to account for the superplus maills and rents more than paid their annualrent, and ascribe them *in sortem* from the date of the wadset, but were only countable from the date of the offer of caution and citation.

Then ALLEGED,—It cannot be from the first citation, because it was extinguished and annulled, by obtaining a protestation against it for not insisting.

The Lords found the first out of doors, and that the account behoved only to begin at the last citation in 1675. See thir parties *infra*, *23d Jan.* 1683. *Vol. I. Page 202.*

1683. *January* 23.—The Lords, upon Stewart's bill, declare the petitioner only liable to count for the excrescent duties over and above the petitioner's annualrent, from the time of Home the pursuer's offer of security for these annualrents, but not since the order of redemption, in regard the whole principal sum was not then offered.

And, on the 27th January, the Lords, on another bill, ordained the pursuer to produce in the clerk's hand the instrument of the offer of caution for the annualrents of the sums contained in the wadset; and ordain the parties to be heard thereupon, when produced, before Lord Boyn, Ordinary; and, in the mean time, stop extracting of the Act. *Vol. I. Page 212.*

1683. *January* 25. JAMES WOOD *against* MURRAY of DUNNIPACE.

MAJOR James Wood, in Edinburgh, against Murray of Dunnipace, or Spot, reported by Pitmedden. The Lords, before answer, ordain their procurators to condescend on the parties' communers at the transaction anent the absolute disposition of the land of Spot to Murray the suspender; and ordain them, and the witnesses inserted in the disposition, to be examined what was *tractatum* between the parties, in relation to this matter. And ordain the Lord Reporter to hear the parties' procurators upon this point, anent Wood, Bishop of Caithness, filling up of the blank in the bond. As also, recommend to him and Lord Drumcairn, in the mean time, to endeavour to settle the parties. Who agreed them on a sum.

It is not to be presumed that the bishop, by his consent to the second disposition, designed to prejudge himself and his daughter of what was formerly provided to him by the former laird of Spot. *Vol. I. Page 212.*

1682 *and* 1683. BROWN, *alias* LAURY, *alias* CRIGHTON, of CRAWFURDSTON *against* LAVEROCK and JOHN CRIGHTON.

1682. *January* 25.—IN Brown, *alias* Crighton of Crawfurdston, his improbation of a bond of relief against Captain Laverock and Mr John Crighton; the Lords finding that Andrew Cunningham, the criminal macer, Laverock's cedent, did prevaricate and vary in his declaration when they tried him in their own presence, they sent him to prison till he was further examined, and where, some few weeks after, he died; and the Lords appointed some points to be further cleared by probation of witnesses. : *Vide* 1*st February* 1683.

Vol. I. Page 170.

1683. *February* 1.—Laury, *alias* Crighton, of Crawfurdston, his improbation against Laverock, Crighton, and Cunningham, mentioned the 25th January 1682, was advised.

The Lords, on the depositions of the witnesses, and other probation, find the said bond of cautionry not probative, and therefore improve it allenarly *quoad omnes civiles effectus.* *Vol. I. Page* 215.

1683. *February* 1. JOHN GOVAN *against* The COMMISSARIES of EDINBURGH.

JOHN Govan, late Treasurer of Edinburgh his relict having advocated an edict of executry from the Commissaries of Edinburgh, whereby they were confirming their procurator-fiscal, on this ground, That they had not cited the nearest of kin, and the relict had a disposition:

The Lords, upon report, remitted it back to the Commissaries, as the only judges competent *in prima instantia* to the confirming of testaments, with this declaration, that, if application be made to them afterwards, in case of any iniquity, they will redress it. *Vol. I. Page* 215.

1683. *February* 7. The DAUGHTERS of JAMES HAMILTON *against* —— HAMILTON, Lady Saughtonhall, and BAIRD.

THE two younger daughters of James Hamilton, against their sister, Lady Saughtonhall, and James Baird, her husband. The Lords found no terce due to the relict, and reduced James's disposition to his said eldest daughter, *ex capite lecti*, and brought in the three sisters equally. Though it was proven, that James, after the said disposition, rode out of Monktonhall to Edinburgh; which they found not equivalent to kirk and market, although, in many cases, it be more than equipollent. *Vol. I. Page* 216.

1683. *February* 9. The Baxters of Canongate *against* The Magistrates of Edinburgh.

The bill of suspension presented by the Baxters of the Canongate against the Magistrates of Edinburgh, for fining each of them in £10 Scots, for importing bad, light, and insufficient bread, on the market-days, to Edinburgh, being reported by Forret; the Lords found the Magistrates had power, not only by the Act of Privy Council in 1609, and their own Act in 1649, but also by the Lords of Session's allowance, and immemorial possession, to cognosce and try the weight and sufficiency of all bread, though imported from the Canongate or elsewhere, (though, in the places where it was baken, they had their own deaconries, or a different standard of weight,) and found they had done them no wrong: but ordained them to be set at liberty out of prison, on consigning their fines in the Clerk of Session's hands; and ordained four of their number to meet and confer with the Magistrates anent the regulation of the bread-market in time coming, both as to weight, fineness, and price. *Vol. I. Page* 216.

1683. *February* 13. Sir William Ker *against* Sir William Bennet, Charles Murray, &c.

The process betwixt Sir William Ker and Sir William Bennet of Grubet, Charles Murray of Haldane, and Others, anent the debatable lands on the borders between Scotland and England, being advised; the Lords found the King and Sir William Ker, his donatar, had the right of property; but that prescription might also run against his Majesty; and therefore found that the neighbouring gentlemen, having conterminous and adjacent lands, might prescribe, by forty years' possession, a right of commonty, and a servitude of pasturage through the same. *Vol. I. Page* 217.

1683. Margaret Peacock *against* David Peacock.

February 3.—David Peacock's service, as heir to Andrew his father, being advocated from the Bailies of the Canongate, to the macers, and three Lords being adjoined as assessors; and Margaret Peacock, relict of James Sands, her service, as heir to the said Andrew her cousin, who died in Dantzick in 1657, being produced to stop David:

The Lords repel the documents adduced for proving and instructing that David was Andrew's son, *viz.* a testificate from two burghers in Dantzick; because it was not taken by the magistrates of the place, nor at David's desire, nor bore that he was present, but that he was at Vidavia, in Poland, near 300 miles distant, &c. And, in regard that it looked suspicious that they were only

suborning an impostor to personate and give himself out to be that man's son, and that he might be only a bastard; they inclined to stop the service, and to direct a commission to Dantzick, to try if Andrew had left a lawful son called David, and if he be yet alive.

But, lest any of Mr Gordon, the factor for the said David, his witnesses, by whom he offered to prove David was his son, should die *medio tempore*, they examined them immediately, to lie *in retentis* for the use of the inquest, when they should come to serve affirmatively or negatively, conform to the probation; which must be the more concluding and pregnant here, where there is another though remoter served already, or else they may be pursued as *temere jurantes super assisam*. *Vide infra*, 18*th Feb.* 1683.

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February 13.—The macers and their assessors having met again on David Peacock's service, (mentioned 3d February current,) they led some more witnesses for either party; and it was proven by two that Andrew Peacock had a son called David, who was reputed a bastard.

The three Lords, by their interlocutor, ordained a commission to be directed to Dantzick and Vidavia, to examine if David be alive, and if he be a lawful son; and to try Andrew's relict, the mother, yet living, if she owns him for her lawful son; with this declaration, If he die *medio tempore*, this delay of his service shall not prejudge him, but, *quoad* Margaret, it shall be reputed as if he had been served.

But Gordon, the pursuer of the brief, offering caution to refund the money, if the probation on the report of the Commission should go against him; the three Lords condescended to give him the whole Lords' answer, if the service or commission should precede one another: which they did upon the 16th day of February; and the Lords, on Castlehill's report, ordained the service to go on; but, before extracting, ordained Gordon to find sufficient caution in the Clerks of Sessions' books, that, if he uplift the money in the Town of Edinburgh's hands, and his service be afterwards reduced upon trial, finding either that he is dead, or was not a lawful son, he shall then refund and repay the money. And accordingly the inquest served him nearest heir; and Margaret Peacock, who was already served, her procurators protested against them for an assize of error.

Vol. I. Page 217.

1683. *February* 18. JEAN WISEHEART *against* The HEIRS of JAMES BONNAR.

JEAN Wiseheart, relict of James Bonnar, and Alexander Wiseheart, now her husband, against Bonnar's heirs. The Lords found a bond secluding executors heritable *quoad fiscum et relictam*, though a charge of horning given upon it was produced; which seemed, by the principles of our law, to render it moveable, as well as a requisition or charge looses an infeftment or wadset, there being no apparent disparity betwixt the two; but the Lords found it continued still heritable, because of its express conception of secluding executors *in omnem*

casum, and as if the party intended a substitution to the heir. Which is very subtile.

But, on a bill, they ordained this point to be heard again in presence. Which was accordingly done on the 1st of March 1683, and then they reversed their former interlocutor; and found a charge of horning rendered a bond secluding executors moveable, as well as any other bond would be so loosed.

Vol. I. Page 217.

1683. *February* 16. BAITH *against* BEITH.

BAITH against Beith, reported by Redford. In a contract-matrimonial, the husband's father obliges himself that his son shall come in equally with the rest of his children, both as to all moveables and heritage he shall happen to have at the time of his decease: thereafter he assigns an heritable bond to another son: the brother quarrels this; and, craving a share of it upon the foresaid clause, it was ANSWERED,—The clause not took away his *jus et liberum arbitrium disponendi*, and he had not this at the time of his decease, being denuded; and so fell not under the clause.

The Lords finding it was not for onerous causes, nor upon necessity, to a stranger, but merely gratuitous to another child, they judged it fraudulent; at least not the parents' design to innovate the clause, and only to give it *pro tanto*; and therefore admitted the brother to a part of it. *Vol. I. Page* 218.

1683. *February* 17. INGLIS of CRAMMOND *against* JAMES CURRY, late PROVOST of EDINBURGH.

THE Lords repelled Curry's ground of compensation founded upon Samuel Moncrief's debt, which Samuel was Crammond's author and cedent; because not instructed nor liquidated before Crammond's arrestment, but long after; and even then it was only by holding Moncrief the bankrupt as confessed upon a debt alleged owing by him to Curry: and, though he had compeared and deponed, his oath could not prejudge Crammond, or his other lawful creditors doing prior diligence, against whom nothing could compensate but a debt owing by Moncrief by bond or decreet anterior to their arrestments or other lawful diligences done by them against him.

And on occasion of this interlocutor, I heard the Lords had found the like within these few years, in a case between the Earl of Annandale and William Johnston of Wamphry and his Creditors. Annandale offering to prove payment of some articles by Wamphry's oath, the Lords found his deposition could not prejudge his creditors who had adjudged from him. See Stair 14*th July* 1666, *Sharp* against *Glen*. *Vol. I. Page* 219.

1683. *February* 21. AIKMAN, Lady Pitcairly, *against* The EARL of HADDINGTON.

AIKMAN, Lady Pitcairly, as executrix to her husband, against the Earl of Haddington, for an account of writings and debursements for the late Chancellor Rothes, which Haddington had subscribed with this condition, If the articles were just. And she offering to instruct them by production of Pitcairlie's count-book, where they were all standing unscored:

The Lords, on Forret's report, found the Earl's subscription not obligatory, unless they otherwise prove the writings and debursements; which they allow her to do by Pitcairlie's servants at the time. *Vol. I. Page 220.*

1683. *February* 21. AIKMAN, Lady Pitcairly, *against* MONCRIEF of RIEDY.

MONCRIEF of Riedy being also pursued by her for an account, and he producing a discharge relative to another account, bearing that Mr John Bayn discharged him of all the articles of writing and others; it was objected, This was not a general discharge, because it was only of the other articles contradistinct from writings.

The Lords found this discharge comprehended all preceding the date.

Then they offered to prove, by his oath, that this was yet resting, and was not then included nor communed on. This was of consent found relevant. *Vol. I. Page 220.*

1683. *February* 22. EARL of TWEEDDALE *against* EARL of LAUDERDALE.

IN the spuilyie of the teinds of Inverkeithing, pursued by the Earl of Tweeddale against the Earl of Lauderdale; the Lords, before answer to the nullities objected against the tack given, in 1641, by the King to the Earl of Dumfermline, of the Lordship of Dumfermline, as set of the annexed property, without a previous dissolution; ordained Tweeddale and the defender, to count and reckon if Tweeddale was paid of the sums for which he and his father was engaged as cautioner for the late Earl of Dumfermline.

This was to bring in my Lord Dumfermline's claim. *Vol. I. Page 221.*

1683. *February* 22. M'QUEEN of CORRYBURGH *against* M'INTOSH.

The Lords, on Kemnay's report, found the marriage was not sufficiently nor legally instructed by the testificates of the ministers, and extracts out of

and extracts out of the kirk-session books, and register; but ordained them to lead witnesses on their marriage, or cohabitation, and being reputed so, and the time of it; seeing *testibus non testimoniis est credendum.*

The words were:—The Lords find the passive titles proven by the seasines and writs produced; but, as to the dates of the marriages, find the same not proven by the testificates produced, not being upon oath: but grant commission to take the depositions of witnesses concerning the time of the marriage of Isobel or Janet Macphersons, and how long they have dwelt with their husbands, and have been holden and thought to be married persons.

Vol. I. Page 222.

1683. *February 22.* CHRISTIAN SCOT and OLIPHANT *against* COCKBURNS and HARY SINCLAIR.

CHRISTIAN Scot, and Oliphant her husband, against Cockburns, and Hary Sinclair, writer, reported by Boyn. The Lords adhered to their decreet, though most unwarrantably extracted; but restricted it to the fee of the sum liferented, and declared the defenders should not be personally liable; and allowed them instantly to prove that the whole 10,400 merks was not solely for the price of the jointure, but also for other things.

Then a bill being given in, the Lords, on the 2d March 1683, found that the fee of the 10,400 merks must be affected with the inlacks of the annualrents, due to Christian, of the said 10,400 merks, and also of the 6000 merks, to which they found she had right: and refused to free the petitioners from being personally liable, conform to the former interlocutor; and that in respect of their compearing and defending without renouncing to be heir; except, betwixt and that day eight days, they so secure the pursuer in that sum of 10,400 merks, at the sight of the Lord Boyn, as that the current annualrents may be recovered, and that the fee may be affected with the inlacks; in which case, they assoilyie the petitioners defenders from being personally liable. *Vol. I. Page 222.*

1683. *February 22.* ARNOT of MUGDRUM *against* JAMES BONAR.

THE Lords altered their former interlocutor, finding it only a substitution; and now they find it to be an absolute disposition. *Vol. I. Page 222.*

1683. *February 23.* His MAJESTY'S ADVOCATE *against* The CREDITORS of URQUHART of CROMARTY.

His Majesty's Advocate's declarator of recognition against the Creditors of Urquhart of Cromarty, was this day advised and decided. The Lords find, as to the *first* point, that alienations though without consent of the superior, yet if they be confirmed before the major part be annalyied, can neither recognosce

themselves, nor come *in computo* to make recognition as to any other lands. As to the *second* point, find the confirmations after the major part is alienated, and before the gift of recognition, does secure themselves, but must come *in computo* to make up the major part for the recognoscing of what is not confirmed. *3tio*, Find the *novo-damus* does so secure against the recognition, that all the alienations before the *novo-damus* cannot come *in computo* to make up the ground of the recognition. And find, *4to*, Notwithstanding the infeftments whereupon recognition is required be likewise in lands of different holdings, as holding feu or blench, and belonging to different heritors, yet they must be considered as a ground of recognition *quoad valorem* of the whole sums whereupon the infeftment was taken, without respect to the relief which may be expected out of those other lands. *5to*, Repel the allegeance, that the infeftments were in trust; as it is condescended on, *viz.* that they were in the vassal's charter-chest, and that he retained the possession; except the vassal's dole and fraud were instructed, or that the gift were to the vassal's behoof. To the *6th*, The Lords repel the allegeance founded upon the resignation made by old Cromarty in favours of his son, albeit bearing a confirmation, in what relates to rights made to the vassal, and not to rights made by the vassals. *7mo*, Repel the allegeance founded on the inhibitions prior to some of the grounds of the recognition; as they had done *supra*, in Muirie's case. *8vo*, They find the infeftments that were, *habili modo*, extinguished before the concourse of the major part, cannot come *in computo*. *9no*, They find that seasines intrinsically null are not to be respected as a ground of recognition.

But I think the not registration of the seasine, within sixty days, is not such an intrinsic nullity. Yet see Craig, *Feudorum lib.* 3, in the case of *Mackenzie* and *Bain*.

This, with John Hay of Murie's case, clears many debates that arose on recognitions. But the fourth and fifth articles of this interlocutor were looked upon as hard, and great stretches of this odious casualty of recognition. The fourth, because if the infeftment be also furth of blench and feu lands, why should it be all cast upon the ward lands: only they say, the vassal *fecit omne quod in se erat*, by giving it also out of the ward lands; and that it is likewise out of others, does not diminish the vassal's ingratitude and contempt of his superior. The fifth was grudged at, seeing there cannot be a more pregnant qualification of a trust and a conveyance, than to find a right in a debtor's charter-chest; which presumes it paid and retired, or led to his behoof: unless another way, *quomodo* it came there, by borrowing or stealing it, &c., can be condescended on; as in Fergusson and Seaton of Carriston's case, in 1678. *Vol. I. Page 222.*

1683. *February* 24. WILLIAM CHIESLEY *against* WILLIAM GORDON and DR TROTTER.

MR William Chiesley, writer, having charged William Gordon and Doctor Trotter, for £100 Scots contained in their bond, on the account of Samuel Chiesly, his brother;—they suspended on this reason, that he had intromitted with more of Samuel's effects than would pay this sum; and he, on oath,

confessed £1200 Scots, but adjected qualities, that he had debursed it on funerals, &c.

The Lords, at the advising his oath, finding the articles with which he charged himself most gross, exorbitant, and uninstructed, they found there was more than room for compensing and taking away the said L.100 bond; and so suspended it simpliciter. *Vol. I. Page 223.*

1683. *February 27.* WILLIAM BAILLIE of TORWOODHEAD *against* FLORENCE GARDINER.

WILLIAM Baillie of Torwoodhead reducing a comprising led by Florence Gardiner against his father; the Lords found it null, because it was led for L.50 Scots more than was due; as was proven by two of his receipts produced.

The Lords now begin to look upon comprisings as so odious, that they are but very bad and uncertain securities, if they have but the least crack or flaw in them; for, upon very minute informalities, they reduce them *quoad* penalties, sheriff-fees, and the expiration of the legal, and the accumulative annualrents; and only sustain them as a collateral security for principal, annualrents, and true debursed expenses: though this be done *ex officio maxime nobili*, like a trysting interlocutor; for, in strict law, they should either find them null or valid.

Then Torwoodhead craved he might count for the whole rent of these years whereof he uplifted a part, seeing he does not condescend on a legal impediment that debarred him from the rest.

But this cause being again heard on the 14th March 1683, in presence; the Lords sustained the comprising, because the granter of the receipts was only liferenter in the bond; though it bore a power to him to uplift it: as also found the granting of these receipts was not an entering to the possession of these lands so as to make him countable for the whole rents, but that he behoved only to count for his actual intromission. So that the Lords in effect altered and reversed their former interlocutor. *Vol. I. Page 223.*

1683. *March 8.* ROBERT BURNET *against* STEPHEN BURNTFIELD.

ROBERT Burnet, writer and commissary of Peebles, his charge against Stephen Burntfield being reported; the Lords ordained this point to be heard in presence,—If Stephen could be forced to confirm here money that was owing to a defunct Scotsman in England.

ALLEGED,—He should; because it was the interest and advantage of the defunct's creditors how much were here confirmed in Scotland, it making the larger subject liable to their payment. ANSWERED,—The Commissary's jurisdiction did not extend beyond Scotland; and what locally lay in England, the Englishmen, ere they would pay it, would have it confirmed in their Prero-

gative Court: and there cannot be an instance given of any money lying in England, that ever was confirmed by a Scots Commissary. Yet we say *mobilia sequuntur personam* where he dwells; but Sir George Lockhart said, our law could not force money abroad to be confirmed here. *Vol. I. Page 224.*

1683. *March* 9. CHARLES FARQUHARSON *against* FARQUHARSON of INVEREY, his Brother.

In this case Pitmedden refused to admit creditors to compear for their interest, to compete and propone defences, or stop the pursuer in his action upon the passive titles for constituting the debt, or in his adjudication; but reserved these to the action for maills and duties: but where it was simply declaratory for constitution of the debt, or upon the warrandice of the father's disposition, he would not admit their interest *hoc loco.* *Vol. I. Page 224.*

1683. *March* 10. JAMES DALE, and —— SYBBALD, his Wife, *against* LAING.

THE Lords found no damage proven by Laing's pasturing on the pursuer's land; but, in regard the witnesses had deponed upon her tilling and riving out the march-balk, they appointed Forret, who lay nearest to it, to visit in the vacance, and to consider the damage and to report. *Vol. I. Page 224.*

1683. *March* 13. HENRY WALWOOD and —— STEVENSON *against* EDWARD GILLESPIE and JOHN SCOT.

HENRY Walwood and Stevenson's reduction, *ex capite inhibitionis*, against Edward Gillespie and John Scot of Vogrie, being reported by Forret; the Lords most justly found, that, the debtor's children being by their mother's contract of marriage in effect heirs of provision to him, (though it was provided to the bairns of the marriage,) they cannot quarrel the rights their father made to the defenders, his lawful creditors; albeit these rights are granted after the inhibition used at the children's instance against their father, upon the mother's contract of marriage. *Vol. I. Page 225.*

1683. *March* 13. ABERCROMBIE *against* DAVID SEATON.

ABERCROMBIE against David Seaton in Elgine, reported by Saline. The Lords find, the sum in question being but small, *viz.* 200 merks, that the quality of the back-bond, obliging him to all diligence of the law, was sufficiently fulfilled by the diligence of horning and caption, without apprising, adjudging, taking his

escheat, or poinding; and therefore decern. For real diligence would soon have exhausted the sum, and was uncertain. *Vol. I. Page 225.*

1683. *March* 14. LUDOVICK SPENCE *against* SIR WILLIAM SHARP and JAMES SCOT.

LUDOVICK Spence against Sir William Sharp, and Mr James Scot, sheriff-clerk of Edinburgh, reported by Colinton. The Lords assoilyied Mr James Scot as not being debtor to Sir Francis Ruthven, but to the King's Majesty and his cash-keeper, as to that fine imposed on Sir Patrick Hepburn of Blackcastle, for harbouring Mr Gabriel Semple, a fanatic minister, and which was gifted to Sir Francis. And also assoilyie Sir William Sharp, he being accountable only to the king and the lords of the treasury for that money. Though it was alleged, from *Damonderii Prax. Criminal. cap.* 83, that *militare stipendium*, especially such donatives as thir, were arrestable and not of an alimentary nature. *Vol. I. Page 225.*

1683. *March* 14. LUMSDEN of INNERGELLY'S CREDITORS competing.

IN the competition among the Creditors of Lumsden of Innergelly; the Lords, on Drumcairn's report, sustain thir two reasons of reduction *separatim* relevant to reduce Cleland's adjudication, with all that has followed thereupon:—1*mo*, That the seasine was not registrate *debito tempore*, within sixty days. 2*do*, That the adjudger himself had, before the adjudication, received payment of part of the sums adjudged for, and so did adjudge for more than was due; and they found the charge against the superior, though without the offer of a charter or a year's rent, is sufficient against competing creditors to supply a year's rent, though it cannot prejudge the superior as to any of his casualties.

And, as to the objections against the children's and John Callander the donatar's adjudications, the Lords repel them *hoc loco*; without prejudice to the creditors to insist in the reduction of these adjudications, as accords. And refuse to consider or receive the said reasons of reduction summarily and *incidenter* in this competition. *Vol. I. Page 225.*

1683. *March* 15. The EARL of MIDDLETON *against* WOOD of BONINGTON.

THE Earl of Middleton against Wood of Bonington, reported by Forret. The Lords find Bonington's bond of caution for William Coupar, who had been Middleton's chamberlain, and had broke without counting for the rent, did not oblige him. *Vol. I. Page 226.*

1683. *March* 16. ROBERT HAMILTON *against* The VISCOUNT OXENFORD.

THE action Mr Robert Hamilton of Pressmennan, as Collector to the Lords of Session of their rents and taxations, against the Viscount of Oxenford, being advised; the Lords assoilyied Oxenford, in respect of the discharge given to his father by the Lords of Session, and found no circumvention, (it were a shame to confess the Lords had been cheated;) and that, Mr Robert Hodge and the other sub-collectors being put in by the Lords, and not by him, he was not liable for them.

(Yet see Halton's case of the *Mint*, *20th January* 1683.) But, in regard there was an error *in calculo* of £1600 Scots founded on, they referred it to my Lord Pitmedden to calculate and discuss it; and found the defender's father might retain his own fifteenth part of their rents, as one of the Lords of Session, those years that he and others were put out *de facto* (and not *de jure*,) by the Usurper, between 1651 and 1660; though he did not serve for it.

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1682 *and* 1683. GEORGE PATERSON *against* GEORGE JARDINE.

1682. *January 27.*—GEORGE Paterson, wright in Edinburgh, against George Jardine, vintner in Burntisland. The Lords, on Saline's report, sustained the execution of an arrestment though it bore not six knocks and a copy fixed on the door; because it bore that the messenger having got access into the house, he delivered a copy of the said arrestment of my Lord Macdonald's horses and cloakbag to the defender's wife, he not being at home himself. And, as to their defence, that they were taken away by Macdonald's servants *vi majore*, the Lords allowed a conjunct probation; the defender to prove armed *vis* within a burgh where help might have been got, and the pursuer to prove that his wife and servants connived, colluded, and concurred with the away-takers; for which he must be answerable, being *in caupona et stabula*, by the Prætor's edict.

As to the first point, anent the arrestment, see the like decided in Stair's Institut. Part 2d, Title, *Confiscations; 25th* and *27th January* 1682, *Somervell. Vide* 17th March 1683. *Vol. I. Page* 171.

1683. *March* 17.—George Paterson, wright in Edinburgh, against George Jardine, inn-keeper in Burntisland, (mentioned 27th January 1682,) being advised; the Lords reversed what they did before, and found the arrestment not legally laid on, being only in the wife's hands and not in the husband's; and therefore assoilyied.

The words of the interlocutor were:—Having advised the probation and writs produced for either party, they assoilyie the defenders from the action of making furthcoming; in respect they find that the arrestment was not known to the defender before the horses and furniture libelled were taken away by my Lord M'Donald's servants, and that the giving of the copy of the arrestment to the wife immediately before the poinding, was not sufficient to make the husband liable; who, if he had known of the arrestment, might have used means to prevent the away-taking of the horses; which his wife could not do.

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1683. *March* 20. WILLIAM AIKMAN *against* SIR JAMES COCKBURN.

MR William Aikman of Cairney, advocate, against Sir James Cockburn of that ilk. The Lords found the general discharge yet open, and Sir James not bound to obtain Sir Walter Seaton's new discharge, till first Mr William counted and reckoned, and cleared any thing Sir Walter had to charge old Cairny with,—of intromissions, or connivance with the merchants, when he was subcollector of the customs; conform to the qualities in the first discharge, and in Sir Walter's letter. *Vol. I. Page 227.*

1682 *and* 1683. JAMES BAYNE and his TUTORS *against* ALEXANDER YOUNG.

1682. *March* 23.—JAMES Bayne and his Tutors pursuing Alexander Young, as cautioner, for Suity, factor in Campvere, for the price of goods sent to the said factor; and for proving his receipt thereof, Suitie's holograph letters being produced; and Young objecting, they could not prove *quoad datam* against his exoneration:—*(Vide supra, March 1st,* 1682, *Trotter* against *Young.)*

The Lords, on Pitmedden's report, sustained the holograph letters, and found the factor's receipts, being relative to bills of loading subscribed by the skipper, is probative, *quoad* the date, to infer an obligation of payment on the cautioners for the factor. See Stair's Form of Process, p. 14, where bills of exchange, merchants' missives, receipts, and accounts, need not the solemnities of witnesses. A parallel case in 1676 was cited. *Vol. I. Page* 179.

1682. *December* 2.—In the cause James Bayn against Alexander Young, merchant in Edinburgh, (22d March 1682;) the Lords, on a bill given in by Alexander, and answers, adhered to their decreet as of before, but superseded extract of it to the 15th of February next; and grant commission to Mr James Kennedy, present conservator in Holland, for inspecting umquhile Patrick Suity, the factor, his count-books, and to transmit an authentic report of any article he finds in these books or writs, for instructing payment of the debt now pursued for; and grant diligence against all others the havers of writs, for instructing the payment foresaid; but it is hereby declared that the time prefixed is allowed for ultimate diligence, without any further.

This favour was shown, notwithstanding that there was an act of litiscontestation in the cause, wherein he had offered to prove payment, and a circumduction following thereupon; and that, with us, merchants' books ought not to prove for them, else they had an easy way to pay all their debts: and it was so found, as observed by Stair, *20th November* 1662, *Wardlaw;* and on the *30th November* 1677, *Anderson.*

But the Lords considered he was only a cautioner for a dead bankrupt factor; and whereof he was publicly exonered shortly after this furnishing now pursued for. *Vide infra, 17th Feb.* 1683. *Vol. I. Page* 198.

1683. *February* 17.—In the case between Bain and Young, (mentioned 2d December 1682;) the Lords, on a new bill given in by Young, and answers, superseded and prorogated the extracting of Bain's decreet till the 10th of

March next, and declare they will advise any report that shall come from the conservator *medio tempore*. And, in respect it is acknowledged by the tutor's oath that payment was made of 600 guilders to Hary Walwood, allow the said sum to the defender; but refuse the bill payable to John Sandilands, in regard there is nothing produced to prove that the factor, Suity, accepted or paid the same. And find that the tutor's oath does not prove that he has any writs that can prove payment by the factor to the defunct, except the foresaid 600 guilders; and modify and determine the guilder at twenty-three shilling Scots, the same being a Flanders guilder, and at twenty-two if a Holland's guilder. And find that annualrent is due since the factor was *in mora*. And declare they will determine the time from which the annualrent is due before extract. *Vide 21st March* 1683. *Vol. I. Page 219.*

1683. *March* 21.—Between Bayn and Young, (mentioned 17th Feb. 1683.) The Lords, having advised the conservator's report, found that the factor's own count books could not prove his own payments; but, as to the article of Sandilands' debt, defalked and allowed it, because the bill was produced, Alexander Young finding caution to warrant the pursuer against it, in case it be found protested or unpaid. And refused annualrent, because the factor's cautioner was not *in tuto* to pay till it were confirmed, the pursuer's title being only an assignation from his father unintimated; and allow all the factor-fee and other expenses contained in the factor's book.

And, on a new bill, they allowed Young to the first of November, to prove any further payments; he finding sufficient caution to pay whatever should be decerned, with the annualrent from the date of this interlocutor.

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1683. *March* 21. JAMES OSWALD *against* DANIEL CATHCART.

BETWEEN James Oswald and Daniel Cathcart, reported by Pitmedden. The Lords reduced Daniel's comprisings. *Vol. I. Page 228.*

1683. *March* 22. THOMAS HUNTER and LADY HAGBURN *against* OUGHTRED MACDOUGALL'S CREDITORS.

CAPTAIN Thomas Hunter and the Lady Hagburn against the Creditors of umquhile Oughtred Macdougall, reported by Harcous. The Lords found that Mr William Wallace's reservation of a power to dispone without the consent of the fiar, *etiam in articulo mortis*, being in the procuratory of resignation, whereupon instrument of resignation followed; and the faculty being exerced by the said disponer, in favours of Captain Thomas Hunter, for a liferent of 100 merks yearly out of the lands disponed; and in the assignation or disposition by the fiars of the two third parts of the procuratory and resignation foresaid in their favours to Oughtred Macdougall, the said Captain, pursuer, his liferent-right foresaid is also excepted and reserved as a burden on the fee; therefore

they find his annuity and right of liferent is a real burden affecting the fee conveyed by Mr William Wallace, the disponer, and does burden these two thirds of it come in the person of Oughtred Macdougall; and this, notwithstanding the faculty exerced by granting the foresaid liferent, was not conveyed in favours of the pursuer by an infeftment, nor was his foresaid liferent-right expressed in Oughtred's seasine. And therefore prefer Captain Hunter to the Creditors of Oughtred Macdougall. And also prefer the relict upon her bond of provision. And find the allegeance, proponed by the creditors against it, is not receivable by way of defence; but reserve action at the Creditors' instance against the relict, as accords. *Vol. I. Page* 228.

1680, 1681, 1682, *and* 1683. JOHN ELIES and the EARL of SOUTHESK *against* The DUKE of HAMILTON.

1680. *June* 17.—IN the action for proving the tenor of a bond, pursued by Mr John Elies, elder of Elieston, against the Duke of Hamilton; the Lords having allowed Mr John to lead his old witnesses, it was objected against Sir Michal Nasmyth of Posso, that he was a bankrupt, lying in prison for debt, and not worth the King's unlaw.

This was repelled by the Lords: but this they sustained to reject him, that he had threatened to do Duke Hamilton an evil turn. Only, objections against witnesses should be instantly verified. See *24th Dec.* 1680.

Vol. I. Page 102.

1680. *December* 24.—In Mr John Elies's action against the Duke of Hamilton for proving the tenor of a bond; ALLEGED, The *casus amissionis* of the bond was not fully libelled. ANSWERED,—The summons bore, that the bond was lost and amissing, and *casus amissionis* in proving tenors is *inter ea notoria quæ allegari quidem debent sed non probari.* REPLIED,—Though they be not burdened to prove the *casus amissionis,* (which ofttimes is latent and impossible,) yet it must be specially condescended upon, that the defender may object against it; and that, by a general, *(in quibus latet dolus,)* we preclude him from redarguing and convelling it.

The Register gave the Lords' answer upon this; but, in his own sentiments, he repelled the allegeance. *Vide 22d Jan.* 1681. *Vol. I. Page* 124.

1681. *January* 22.—In Mr John Elies's cause against Duke Hamilton, (24th Dec. 1680,) the Lords found,—if the action for proving the tenor had come in *incidenter,* upon another principal action depending between the Duke and him,—they would have granted a summary enrolling and hearing thereupon, in the Inner-House, as they did lately in Lady Mary Cunningham and Sir John Maitland's case against Cardross: but here they could not; because the process, whereon the proving of the tenor depended, was only betwixt Southesk and Elieston, and therefore Elieston behoved to enrol *in communi forma. Vide 26th Nov.* 1680, *Lockhart;* and *16th June* 1681, thir parties.

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1681. *June* 16.—In Mr John Elies his action for proving the tenor of a lost bond against Duke Hamilton, (22d Jan. last;) Alexander Gelly, writer,

being adduced as a witness, and it being objected against him that, by a letter written to Elieston, he had declared what he knew of that bond, which was *proditio testimonii:*

Answered,—A witness might lawfully do this, where there was no good deed neither given nor promised.

This being reported by Nairn, the Lords found the objection amounted to this importance, that he should only be admitted *cum nota.*

In the same cause, upon another report of Nairn's, the Lords, on the 21st June 1681, found Alexander Gelly's letter ought to be delivered up to him, before he be obliged to depone, and ought not to be keeped over his head, as a check to curb the freedom of his testimony, or to found any pretence of perjury against him, if his deposition should happen to differ from what he had written.

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1682. *February* 7.—Mr John Elies and Southesk's cause against the Duke of Hamilton, (22d Jan. 1681,) being advised; the Lords found the *casus amissionis* sufficiently instructed; and sustained the adminicles adduced. And found, by the writs and depositions produced, the tenor of the £1000 sterling bond was fully proven; and therefore decerned in the said tenor.

Duke Hamilton clamoured how dangerous this might be, to make up personal bonds which might be satisfied, retired, and cancelled, without taking a discharge, which many did not judge necessary, and that by the depositions of witnesses; and what made it the harder was, that the *testes instrumentarii, viz.* Robert Kennedy and Hamilton, did not remember distinctly, their subscriptions not being present to show them for refreshing their memories; but there were many adminicles in writ here. Anent *non memini*, see Balmano's Practiques, *tit.* Improbation; and Dury 1636, *Lord Banff.* *Vol. I. Page* 171.

1681–2. *Session.*—In Mr John Elies his proving the tenor against Duke Hamilton, (7th Feb. 1682;) Sir Michael Nasmyth of Posso being adduced as a witness, the Duke objected that he was a bankrupt and in prison for debt. The Lords notwithstanding admitted him.

Yet I find Mascardus affirms *carceratum non plene probare ut testem, sed recipi debere cum nota.* *Vol. I. Page* 182.

1683. *March* 2.—The Earl of Southesk and Mr John Elies against Duke Hamilton, (mentioned 7th Feb. 1682,) is reported by Saline. The Lords sustained the summons for payment, though dated before the decreet making up the tenor of the bond, seeing the debt was in being before that decreet; but allowed the Duke to propone compensation on debts either already liquidated or shortly liquidable.

The words were:—Sustain process, notwithstanding of the allegeance proponed by the defender; but declare that what the defender's procurators shall propone by way of compensation, being *de proximo liquidandum*, they will receive the same in this process, it being always liquidated before sentence to be obtained by the pursuers. *Vide infra*, 22d current. *Vol. I. Page* 224.

1683. *March* 22.—The Earl of Southesk and Elieston against Duke Hamilton, (mentioned 1st March 1683,) being reported by Saline; the Lords,—before answer to the defence upon the order of discussing Duke William the debtor's heirs of line, *viz.* his daughters, before the present Duchess of Hamilton, who is but his heir of tailyie, and the condescendance on Inverwick as the subject of the discussion,—ordain Southesk to produce his contract of marriage,

containing a renunciation of all that his Lady, one of Duke William's daughters, could claim, save only this legacy of Mr Livingston's bond of £1000 sterling, now pursued for; and the Duke to produce the obligement given by the heirs of line, that they shall relieve the heir of tailyie, also founded on.

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1683. *March* 22. The EARL of TWEEDDALE *against* The TENANTS of PINKY.

THE Earl of Tweeddale charger, against the Tenants of Pinky, reported by Boyne. The Lords found the letters orderly proceeded; and sustain the Commissaries of Edinburgh their decreet; in respect of the probation, and the Act of Parliament 1633, modifying the teind to the fifth part.

Yet that Act was mainly for heritors and titulars, and not for masters and tenants; and, though they were really damnified by that low valuation, (the fourth part being the true intrinsic value,) yet they had an ease by the overrunning of the mettage of the acres, and were free of the expense they would have been put to in leading away their own teind. *Vol. I. Page* 228.

1680, 1682, *and* 1683. The EARL of MARISHALL *against* His WADSETTERS and VASSALS.

1680. *February* 28.—IN the Earl of Marishall's improbation against his vassals and wadsetters, it was ALLEGED for one, You cannot crave certification against my rights, because I offer to prove any title you pursue by is apprisings which were bought in by the Earl your brother's means, from whom I got my right, though they were taken in Major George Keith's name as trustee; and so they must accresce to me in warrandice, *nam jus venditoris accrescit emptori.*

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1680. *June* 10.—The E., as he who hath acquired some comprisings upon that estate, pursues the wadsetters to count and reckon for their intromissions.

ALLEGED,—They cannot be liable, upon the 62d Act of Parl. 1661, to count for the superplus duties over and above the annualrents of the sums contained in their wadsets; because this Earl's brother, when he was heritor, gave them a discharge thereof, as having counted to him for the same.

REPLIED,—This declaration and discharge of the debtor's cannot prejudge other creditors whose rights this Earl hath now, *ex titulo singulari*, acquired; but they must account for the superplus, and not keep up their debts as unpaid, to seduce and debar other creditors (who are posterior,) from coming in in their just ranks.

This was taken to interlocutor. *Vol. I. Page* 101.

1682. *March* 28.—The Lords ordained this point to be heard *in præsentia*, Whether or not an apparent heir, acquiring in an expired comprising on his predecessor's estate, and by it calling the wadsetters to count and reckon for the superplus rents, more than pays them their annualrents, on the 62d Act, Parl.

1661, or offering caution during the not requisition; if he, in such a case, ought not to be liable in the requisition; not indeed to infer a universal passive title, but, seeing he seeks benefit of the superintromissions, that at least he may state himself as their formal debtor. It is a certain truth, that an extraneous compriser could not be forced to these terms; but the case of an apparent heir buying in such apprisings is not so favourable. *Vide* this decided *22d March* 1683. *Vol. I. Page* 181.

1683. *March 22.*—In the Earl of Marishall's cause against his wadsetters, (28th March 1682;) the Lords, *in præsentia*, found, that whatever apparent heir, as creditor, or singular successor, took the benefit of the 62d Act of Parl. 1661, anent restricting wadsetters to their annualrent, and imputing the superplus *in sortem*, should *ipso facto* make himself liable in the requisition, so as to become personally bound for what should be found resting them, on a count and reckoning, both principal and annualrents.

Which was looked upon as a most just decision. *Vol. I. Page* 229.

1674, 1676, 1682, *and* 1683. The Earl of Dunfermeling *against* The Earl of Calendar.

1674. *February* .—By a minute of a contract-matrimonial passed betwixt the Earl of Calendar and the Lady Dumferling, grand-mother to the present Earl, amongst other clauses he is obliged, in case there be no heirs procreated of the marriage, to dispose upon the half of the conquest by the advice of the Countess. The words are, The half of the conquest shall be disposed upon as she shall think fit. Dumfermeling, as heir to his grandmother, pursues Calendar to dispone the equal half of such lands and sums he condescended on in his summons, *super hoc medio*, that they were conquest *stante matrimonio*, and there was no issue extant of the marriage. Alleged for Calendar, that this clause related only to the liferent of that half of the conquest, and not to the fee of it. *Secundo*, That the provision was only conditional, in case of no heirs or issue of the marriage; but so it is, there was a child of the marriage betwixt them: and, albeit the child predeceased the dissolution of the marriage, yet the naked existence of the child purified the condition of the clause.

Answered for Dumfermeling the pursuer, to the *1st*,—That the clause behoved to relate to the fee and property, because, by an anterior clause, the liferent of all other conquest already, or to be conquest, is provided to her. So this must superadd and operate more; which can be nothing else but the heritable right.* To the *2d*, Nothing can purify that condition but a child procreated, surviving, and actually existing, heir of the marriage; which was not here. See Dury, *27th January* 1630, *Trumbull* against *Colsuresby*, and the marginal citations there, from *Joannes a Sande, Gudelinus, Matthæus de Afflictis, Hippolitus de Marsiliis, Cardin, Mantica, Bartolus, Suinbourne*, and the laws there quoted. See *22d February* 1656, *Lady Langton* against *Rollo; vide infra*, No.

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* See *Vulteius de Feudis, lib.* 1. *cap.* 7. No. 68, 69, *et seq. page* 152, *et seq. Vide infra*, [No. 478, *Catharine Mitchell*, 17*th June* 1676;] *Item*, No. 27*th June* 1676, thir same parties.

555, § 6. For the 1*st* point, see the elegant Joannes Vandus, *lib.* 1*mo*, *Quæstionum Juris, cap. tertio*, where he thinks this formula of a husband's writing and nominating *uxorem suam dominam omnium suorum bonorum* imports not the property and dominion thereof to be acquired to the wife, but must be interpreted *commode et sanó sensu de usufructu* for the reasons there drawn *ab impropriatione verborum deflectendorum ad mentem loquentium, cui omnino inservire debent.*

There was also a third point debated; for Dumfermeling craved sundry rents of her jointure lands, which Calendar had uplifted *contra fidem tabularum nuptialium*, by which he obliged himself not to intromit with her jointure.

Answered for Calander,—This being a renunciation of his *jus mariti*, before the marriage; yet, by the subsequent solemnization of it, the benefit of that renunciation did return and accresce to himself again *jure mariti.*—See a large and clear observe anent thir renunciations, in another manuscript beside me; where it is shown from this, and the Lady Innerteill and Colinton's case, that thir renunciations stand good against the husbands, though they will not exclude his creditors.

This debate being reported, by the Ordinary who heard it, to the haill Lords, they found the aforesaid clause related to the fee of the half of the conquest. As to the *second*, before answer, they ordained witnesses to be adduced for proving if there was a child born at all, and how long he lived: and forbore the advising of the third point, anent the recurring of the renunciation to the *jus mariti*; because the reporter informed them that Calendar the defender's advocates desired to be heard upon it *in præsentia.* Which the Lords agreed to; and calling in the parties and advocates, first the defender's procurators craved eight days' delay, and that being past, then other eight days; after which, instead of debating *peremptorie in causa*, they proponed a dilator, upon the article of the regulation appointing where the Lords were to hear causes in their own presence, which were brought from the Outer-House, they behoved to be enrolled in the roll of the Inner-House and called only in their tour.

The Lords demurred much upon this punctilio of form, knowing many were lying at the watch: at last they repel it. And yet they needed not have been so shy, having rejected the same individual allegeance, in June 1673, in *Sir Andrew Ramsaye's case* against *Francis Kinloch:* see it marked at large *supra*, No. 400.

At the pronouncing of this interlocutor began much mischief, and a train of animosity and alienation in the Session, that we can most justly term this a fatal cause, and wish the scandal had never been borne; for the Lord Almond presented an appeal to the Lords, bearing that he appealed from their unjust interlocutor to the King and Parliament. At this the Lords startle, and they fright the King with the dangerous consequences of it as a factious draught. He writes down a letter commanding inquiry to be made into the advisers of that dangerous appeal. Sir G. Lockhart, Sir Jo. Cunyghame, Sir G. Mackeinzie, Mr Wm. Weir, being Calander's counsel-at-law, are called; and they refuse to give any answer as to their accession, but maintain that an appeal, having the effect of a protestation for remeid of law, was a competent and allowed remedy against sentences of the Session. *Hinc illæ lachrymæ*; for, in the

Summer Session, 1674, a peremptory letter from his Majesty commanded these advocates to disown appeals; which they refusing, were, on the 24th of June 1674, deprived of their offices, and near 50 more advocates, from resentment of the injury done to their employment, did desert their employment, and were thereupon also debarred. See the large history and account of all them traverses, in another manuscript, *paginis* 90, 91, *et duodecim paginis sequentibus.* See also this matter of fact more fully narrated in the President or Cragie's answer they made to the address presented by the outed advocates to the Secret Council, on the 28th of January 1675.

As for the event of the law part of this fatal debate between Dumfermeling and Calandar, see *infra*, [27th June] 1676, No. 480; at which time it got a definitive stroke, where, amongst sundry other grounds urged beside the three above mentioned one, there was one very pretty defence proponed for Calander, that them words,—With power to the Countess to dispose upon the half of the conquest, as she should think fit,—was a mere personal faculty committed to herself, and whereof she never having exerted the *exercitium*, it expired and died with herself, and transmitted not to her heirs; she not having used it in her lifetime was a sufficient tacit declaration of his intention it should remain and abide with the family of Calandar. See the answers to it there, where the Lords found it was not a mere personal right and faculty, but a transmissible fee and dominion, stated and rooted in her person; though law says, *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia*, especially with us in heritage, *L.* 20 *C. de Pactis.*

Before I leave this subject, I will descant a very little upon the case of appeals. By the Roman law *non licebat appellare ab interlocutoria*, because the judge might correct and alter that at his pleasure, and there was so no notable *gravamen.* But appellations were only *a sententiis definitivis*, which their judges might not revoke, because *functi officio.* See this in Joan. Bellonus his 2d Book *Antinomiarum juris civilis et canonici*, cap. I. page 79. With us, conform to the equity of the canon law, the Lords of Session, nor no other Judges, are tied with the foresaid nicety; but they may, at any time before extracting, change and reform their sentences whether interlocutory or definitive; and appellation may be interjected from either: but with us, appellation (when used against decreets of Session,) has only *effectum devolutivum*, and not *suspensivum* to stop process or sist execution, (which is the nature of a proper appeal.) See this distinction in Bachovius, *in notis ad Vesembecium et Trentlerum, ad tit. D. de Appellationibus*, and in Perezius, *commentario ad dictum titulum Codice.* And these appeals in effect are no more, and should rather be called a protestation for remeid of law, as Balfour, in his *Practiques, tit.* Of the Session, folio 61, cap.—, speaks;* and the Act of Sederunt in November 1567, condemning murmuration of the advocates or parties against the interlocutors of the Session; and is designed for a declaration to take off acquiescence, and that they do not rest satisfied with the sentence; but will mean themselves to the superior Judge, the King and Parliament, to have it amended and reversed: though some are of opinion that such a protestation *inest de natura rei*; and, whether express-

* It is leasum to appeal from the Council to the Parliament, says Balfour in his Practiques, tit. Of the Institution of the College of Justice, cap. 16.

ed or not, the Parliament's superiority is sufficiently salved, so as they may proceed to the reconsidering of it: which see fully canvassed and debated in other papers *alibi*.

In the common law, *a Præfectis Prætorio non licebat appellare; vide tit. C. de Præfectis Prætorio, ibique Perezium;* with whose power the Lords of Session, as Supreme Ordinary Judges in civil matters, seems to bear an analogy and resemblance, and they seem to have much the same authority and jurisdiction; and as the Roman emperors could invest that magistracy with such an ample power, why may not our predecessors have done the same to the noble judicatory of the Session; and which the King and Parliament have truly and *de facto* conferred on the Session, as wisely finding no less power to be necessary for lodging the subjects' property in security; and which they have done by the 68d Act in 1457, ordaining all causes cognoscible by the Lords of Session shall be utterly decided and determined by them, but any remeid of appellation to the King or Parliament. See the many laws and others cited in the margin there.

It seems incompatible to have two supreme sovereign unaccountable and unappealable courts and judicatories, conversant about one subject matter in one kingdom. In England there is an orderly subordination, by which you may appeal from one court to another aye till you come to the Parliament; and this order nature has taught all the world over. In France there is a resort from all their parliaments, præsidials, seneschaussees, and other courts, to the Parliament of Paris, whose decisions are called *arresta*, because there must be a stop, *et non datur ultra*; and yet even iniquity may be complained of against their decreets, only they are Judges to it themselves; as I have shown at length *alibi*, out of Mornacius, *in Observationibus ad L 2, parag. 24, D. de Origine Juris*. See the manner of their appellations *in forme d'enqueste civile*, or *proposition d'erreur*, clearly explained by Ægidius Bardin, in his *Methodus Juris Civilis*, pages 149, 150, *et seq*. See the compend of it in papers beside me, he being more nervous and pertinent in this part than any where else in all his book. In the foresaid compend of it, see also pretty reflections on the legislative, judicative, and executive power, and an application of them to the affair of appellations.

In Frizeland they allow, against the decreets of their Supreme Senate, two remedies; one *per reauditionem*, the second *per revisionem*; but both are before themselves. See this largely discoursed in Joannes Bouritius, his honest tractate *de Officio Advocati*, cap. 32, 33, and 34, and my compend of it; where he shows, that, in the province of Holland, and elsewhere, they have proper suspensive appellations. Of ecclesiastic appellations, see Mr Luke Ogle's discourse, *apud* me; and Mr Fox his History of the Martyrs, in his giving account of Becket, Archbishop of Canterbury.

And really it seems morally impossible that, when one is wronged by the Lords of Session, there should be no remeid. It is absolutely fit they have some countermand and check to curb them from turning arbitrary; and appellations devolutive, as we have explained them, are the just and adequate remedy of this evil; and the individual one given in by Almont was just and rational in itself: and no lawyer dare affirm but the Session is subordinate and accountable to the Parliament, who considers that the impugning and diminishing the authority, jurisdiction, and power of the Parliament over all, is guilty of high

treason, by the 130th Act in 1584. And whereas, it is pretended that the King has signified his pleasure by a letter; it may be replied, that such, being impetrated *per subreptionem et obreptionem, partibus non auditis,* is but *rescriptum vel pragmatica sanctio, contra jus vel utilitatem publicam*; which *ab omnibus judicibus refutari jubemus,* says the Emperor, *in L. C. Si cont. jus vel utilitatem publ.*, and our Acts of Parliament; Act 47 in 1587, Act 68 in 1587.

Yet, on the other hand, it may be thought that the Lords of Session can determine a cause as well as any Provost from a burgh, or gentleman from a shire may do, though even you take the Parliament in the whole aggregate and collective body. Ærodius, in his learned Pandects *Decretorum, seu Rerum Judicatarum, libro* 4, *tit* 4, *De Injuriis, No.* 22, *edit. anni* 1573, can tell us, *Judici postquam pronuntiavit judicii iniquitatem non licet objicere, imo gratias agere oportet.*

As to the other part of the controversy wherein the Lords urged the advocates to depone anent the advice they had given their client, my Lord Almont, and their accession to his appeal; this seemed illegal: 1*mo*, Because that were to force men to depone *super inquirendis*; prohibited as tyrannical by the 13th Act in 1585, and by Acts of General Assembly. 2*do*, This were contrary to our allegeance and duty; which is to conceal, and not propale our clients' secrets. 3*tio*, *Consilii non fraudulenti nulla est obligatio, L.* 47 *D. de Regulis Juris.* 4*to*, If the advice be quarrellable, then they cannot be forced to depone; because their oath may infer a guilt or crime against them: *nemo tenetur se accusare, propriamque prodere vel revelare turpitudinem.* All civil nations hold that to be a sacred seal that lies upon advocates, not to prevaricate, else the lieges shall never be secure of a sixpence. And that the owning and acknowledging accession may import some guilt, (though none can tell the name of it,) appears from his Majesty's letter terming the appellation illegal, and to touch his honour. And whereas, the Lords of Session offer to declare it shall import no crime; this cannot be rested on: 1*mo*, Because the Lords of Session have no jurisdiction to remit crimes, or declare that a criminal confession shall not operate or militate against the confessor: the Justiciary would not regard this security given. 2*do*, *Esto* they could give it to procurators and members of their own court, yet *indulgentia quos liberat notat, nec infamiam criminis tollit, sed pœnæ gratiam tantummodo facit, L.* 3 *C. de Generali Abolitione.* Who are conscious of no guilt will take no indulgence or remission.

Neither can this case be drawn in with any ingenuity under the compass of the Act 2d in 1670, for that allows only examination *super inquirendis*, for discovery of conventicles, &c.; far less can our oath of allegeance and obedience to the Lords, given at our admission as advocates, be large enough to palliate such an arbitrary stretch as this; for that must be understood *secundum terminos habiles juris;* and we must at least be granted to be rational men, and not to be bound to a blind canonic and implicit obedience. See Dury, 14*th Nov.* 1628, *Betsone* and *the Laird of Grange;* Annæus Robertus, *Rerum judicatarum libro* 2, *cap.* 19; Josephus Mascardus, *de Probationibus, vol.* 1*mo*, *conclusione* 66, *item conclusione* 1239; *Lex ult. C. de Testibus;* M'Keinzie's Observations on the Act of Parliament 1621, against bankrupts, where he debates the question, if an advocate can be forced to depone anent

advice given to his client; it is page 189, *usque ad finem libri*; he leaves it problematick, yet inclines to the negative. See him also in his book of pleadings, in that criminal one for Charles Robertsone, if one be obliged to depone, where it may reflect upon himself; it is page 207, *et seq.* See the same case marked by me, *supra*, in thir Observes and Collections, at the 9th of March 1671, No. 162. See also the 25th February 1671, it is No. 157; and Hippolitus de Marsiliis, *singulari* 424, there stated; and where it is compared by me to a priest's confession: and yet I find that Sir Robert Sinclar was made to depone in Towy Barclaye's case anent falsehood.

I remember I heard Mr David Dinmuire tell that, in a case wherein he was concerned as advocate,* the Lords, in the Winter Session 1675, found that an advocate was not obliged to detect, by deponing as a witness, what was revealed to him by his client at the consultation and advising of his case. But what an advocate hears otherwise, he may be forced to declare the same upon oath; seeing, there, he is to be reputed *tanquam quilibet ex populo*, and not in the capacity of, and under the reduplication *qua*, an advocate; and it may fall out to be in matters extrinsic from the process. But this seems as ambiguous as the devil's oracles at Delphos.

I put the case: An advocate sees a paper of his client's only for the sake of one clause in it, and yet he reads it all over, by which he comes to know defects, weaknesses, or intrigues in his client's rights that were not particularly revealed to him nor committed to him *sub sigillo confessionis*, as Aspilcueta, Doctor Navarrus, in his *Manuale Confessariorum*, and the other casuists, term it. *Quid Juris?* under which of the two members of the foresaid definition would that case fall? *Esto, argumenti causa*, in a debate anent an intimation, or the incurring of a clause irritant, a whole writ were read in order only to one clause in it. The Lords found a man was only obliged to know it as to that clause, and not *pro reliquo*; Hadington, 29th Nov. 1622, *Murray* against *Durhame* and *Others*. See it also in Dury, *eodem die*.

But, to sum up this excursion, I having written such infinite numbers of observations upon the debate agitated between the bench and bar, anent the lawfulness of appeals from the Session to the King and Parliament, I shall spare all superfluous repetition here, and only refer to these remarks. See therefore a large discourse arguing the subordination and inferiority of the Session to the Parliament, and the justness and necessity of appeals, and answering nine several objections against them. See the public address was given in by the outed advocates to the Secret Council on the 28th of January 1675, containing a justification of the grounds of their secession, and exceptions against the king's letter discharging protestations for remeid of law. See the President's answer to it. See the criminal indictment and libel exhibited against us for subscribing that address. See the published answers were made to that libel; *item*, some private animadversions I made upon it, containing much variety and freedom. See Mr Dinmuir's observations upon appeals. See all the letters from the King or my Lord Lauderdale to the Lords of Session, or of the Session to them, upon this matter,

* It was in a proving of the tenor, wherein the Lords ordained him to depone if ever he saw that writ shewn to him, at a consultation or otherwise, whereof the tenor was craved to be proven, but did not oblige him to tell what was in it.

apud me, and in my abridgment of the Books of Sederunt. See the history of the affair of the lawyers from its original animosities, *viz.* the regulations, till November 1676. See also all the acts, authors, and papers I have cited in the short hint I made here at appeals; on which, as I could not dwell, because of the plentiful comments I had made on it already, so it had been uncivil to have wholly past it over here *sicco pede*, this being the natural seat of that famed question that inflamed the country into violent factions. See, anent the grievance of the ignorance and corruption of the Lords of Session, in many papers, and particularly in the Transactions of the Parliament 1673, page 68 *et seq.*, where it is *ad nauseam* discoursed of, and many other papers beside me. *Vide practicam sequentem; item*, a discourse of the nature of the Lords of Session's jurisdiction; *item*, of the arbitrary power of the Secret Council. *Vide* an instance of an erroneous decreet, No. 479, [June 1676;] *infra*, 517, *in fine* § 11, [December 1676, *The Calmer.*] *Advocates' MS. No. 445, folio 232.*

1676. *June 27.*—In the fatal and scandalous action Earl of Dumfermeling against the Earl of Calendar, mentioned *supra, numero* 445, [February 1674;] (which was resumed at this time;) it was ALLEGED for the defender,—1*mo*, That, the old Earl of Calander (who was the principal party convened in the summons,) being dead, no process could be sustained against this Earl till the same were transferred.

The Lords found no necessity of transferring, because he was convened *pro interesse* in the first summons; which was sufficient.

2*do*, ALLEGED,—That the clause of the minute of contract-matrimonial was conditional, and never purified.

The Lords found the Lady had right to the half of the fee of the conquest, in respect the child deceased long before the dissolution of the marriage; and because Calender had no visible way to conqueish, but by his Lady's great liferent, which was equivalent to his present estate; yet, so that all debts during the marriage burdened equally both halves; but found what was purchased in place of that which was the husband's before the marriage, was not to be reputed conquest. *Advocates' MS. No. 480, folio 248.*

Infra, No. 492, § 3, [July 1676;) about the declinator was in this cause against Newton; *infra*, No. 494, [Historical Volume,—thir same parties.]

1682. *March 25.*—The Earl of Dumfermline's cause with the Earl of Callander advised. The Lords found the value of the conquest to be proven;—and decerned Callander to restore the half of it, conform to the minute of contract, to Dumfermline, with the bygone maills and duties since the acquisition: which will do more than exhaust the other half.

But there can be no conquest esteemed *nisi prius deducto ære alieno;* and Callander's procurators at last gave in a condescendance of considerable debts, and offered to instruct them; all which behoved to defalk from the conquest. *Vide infra, 11th May* 1682. *Vol. I. Page* 181.

1683. *March 22.*—The case between Dumfermline and Callender is debated, anent the debts which Callender gave in, to diminish and abate the conquest proven, (*vide* 25th March 1682;) and Glorat's debt was refused to be allowed, because they wanted the bond; though they produced a comprising led on it, with a renunciation thereof: which the Lords would not sustain as a sufficient probation; but adhered to their former interlocutor.

This was thought very hard. *Vol. I. Page 229.*

1683. *March* 23. EDWARD FOUNTAIN *against* ANABLE and MARGARET LAUDER.

EDWARD Fountain against Anable and Margaret Lauders, reported by Castlehill. The Lords turned the bailies of Edinburgh their decreet into a libel, in respect, upon the production of the tack, it was expired, and they had used a warning against him, and so taken off his tacit relocation; and yet the bailies had decerned him to be repossessed. *Vol. I. Page* 229.

1681 *and* 1683. THOMAS RAMSAY and JAMES AITKENHEAD *against* HELEN RAMSAY and BROWN.

1681. *December* 23.—MR Thomas Ramsay, minister at Mordington, offering a cautioner in the loosing an arrestment laid on by Helen Ramsay, his sister, and James Aikenhead, apothecary, her husband, on a depending process; and the cautioner being refused by Sir William Bruce, clerk to the bills; and Mr Thomas offering *cautionem juratoriam*, that he could not find a better, the Lords absolutely refused to allow it in this case, though they admitted it in passing of suspensions. See Stair, 16*th July* 1661, *College of St Andrew's*. *Vol. I. Page* 167.

See the intermediate parts of the report of this case, Dictionary, page 4234.

1683. *March* 28.—In Helen Ramsay's case against Brown, (mentioned 20th Dec. 1682;) she offering to prove, by his oath, that he promised that his wife's tocher of 1000 merks should come back to her friends, if she had no children; and he having deponed *negative*, she, upon a bill, got an order to reëxamine him, he always not altering the deposition to his own advantage. Which is a caveat may be used and adjected in such like cases of reëxaminations. *Vol. I. Page* 230.

1683. GEORGE SETON of BARNS *against* The LADY BEARFORD, &c.

February 7.—SIR Arthur Forbes, Viscount Granard, Lady Margaret Hay, and the Lady Bearford, gave in a bill against George Seton of Barns, complaining he had vitiated a principal agreement, or decreet-arbitral, passed betwixt his father and him in 1658, by making *eighteen* hundred *sixteen* hundred, and *his* estate *this* estate, and adding the word *rents*, which corrupted the sense.

ANSWERED,—They were not vitiations, but amendments, inserted in it at the very beginning by the arbiters.

The Lords, having considered the bill and answers, recommend to my Lord Register and Redfoord to hear the parties anent the vitiation of the said decreet-arbitral, and upon the haill points controverted; and, for that effect, grant warrant to the Commissary-clerk of Edinburgh to exhibit and produce the principal decreet-arbitral in question; and to the Clerks of Session, and

Keepers of the registers and records, to exhibit and produce, before the said Lords, any grounds or warrants, and books, that can clear the whole matter. And ordain the Lords to make report. *Vide* 13*th March* 1683.

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March 13.—George Seton of Barns, in the affair between him and the Lady Bearford, &c. (mentioned 7th Feb. 1683,) on a bill gets a deliverance and warrant to examine the Commissary-clerk and his servants on the said minute and its extracts; as also a commission to examine Mr Robert Hodge, the arbiter, and writer of it, &c.—*Vide* 30th current. *Vol. I. Page* 225.

March 30.—The Viscount Granard, Lady Logie, and Lady Bearford, against George Seaton of Barns, (mentioned 13th current,) being advised; the Lords found, by the writs produced, the deposition of Mr Robert Hodge of Westgladsmuir, the arbiter, and writer of the minute of the decreet-arbitral, and the Commissaries their clerks and servants, and particularly by the oaths of Home and Sandy, that the said decreet at the beginning has borne *his estate*, and is since made *this estate*, by adding the letter T to *his* in two places of it, where Sir John Seaton, his father, is empowered to dispose upon the rest of his estate; and that it has no other vitiation in it; and that it appears that Barns, neither by himself nor others, had any accession thereto.

Barns, in this process, to blunt Lady Margaret Hay his stepmother's process, by the popish priests, agreed with her. Yet the enemies he left behind prevailed thus far, as we have seen; which they sought to counterbalance and enervate Barns's suit he had commenced in Ireland, for some lands there belonging to his father, where they made use of the foresaid decreet-arbitral as a renunciation of all he had to crave, save the lands of Barns. *Vol. I. Page* 231.

1683. Sir David Carnegie of Pittarrow *against* Smith and Montgomery.

March 23.—Sir David Carnegie of Pittarrow against Smith and Montgomery, tenants of Graham of Crigie, reported by Drumcairn. The Lords refused to allow the payments made by these tenants to Barbara Ramsay, and Lyles, her children; because, though they had preferable infeftments to Pittarrow's, yet, being called to his decreet of preference among the other creditors, they are not ranked there, and that decreet of preference was the only rule for paying; and allowed the rest of the articles of their discharge. Only ordained the prices of the victual to be calculated at the sheriff's fiars for these years. *Vide* 30th current. *Vol. I. Page* 229.

March 30.—Sir David Carnegie of Pittarrow his general declarator of escheat against Smith, Crigie's tenant in Mathers, being reported by Castlehill; the Lords found the denunciation of the said tenant to the horn, null, because it was general for payment of a superplus not then liquid, and which could not be; because the very annualrent of those creditors ranked before Pittarrow in his own decreet, was far more than all his rent extended to, though there was a superplus due among the whole tenants. *Vol. I. Page* 231.

1683. *November* 6. MARION HUNTER and WILLIAM HENDERSON *against* JOHN BROWN and JOHN ROGER.

See the prior part of this case *supra*, page 387.

THE action pursued by Marion Hunter and Mr William Henderson against John Brown and John Roger, agent, being advised this day; the Lords found, by the depositions of the witnesses adduced *hinc inde*, that the pursuer's first reason of reduction upon her furiosity, the time of her subscribing the tack, and prorogation and ratification thereof, is not proven. But find the other proven, *viz.* That the pursuer was circumvened in subscribing the said prorogation and ratification; it being only holden furth to her that the former tack was only to be prorogated for a year or two further, and not aye and while the sums due to Marion Brown should be paid; and therefore sustain the prorogation and ratification of the said tack only for two years after expiration of the first tack; and reduce the prorogation and ratification for subsequent years.

Vol. I. Page 240.

1683. *November* 7. The EARL of LAUDERDALE *against* GRAHAM of CLAVERHOUSE.

THE Earl of Lauderdale, upon a bill to the Lords, gets a stop to the charge of horning given him by Claverhouse, the high-treasurer, and Hew Wallace, cash-keeper, on the decreet anent the mint; in regard he offered obedience to the King's final determination in May last, and so ought not to be charged for the whole £72,000 sterling, contained in the Lords of Session's decreet.

Vol. I. Page 241.

1683. *November* 8. DAVID BLYTH and DUNCAN *against* BEATY and ANDERSONS.

DAVID Blyth and Duncan against Beaty and Andersons is reported by Lord Blair, Probationer.

There are three brethren: the youngest conquished lands, and dies infeft therein: his only child and daughter is infeft after his death, as heir, and so it becomes of the nature of heritage, and she dies. The two uncles debate about the succession: the immediate elder, or mid-brother, alleges it is his, and cites a decision in his favours, recorded by Stair, *20th July* 1664, *Lady Clerkington* against *Stewart*. The eldest of the three contends it is his right, seeing it would only fall to the immediate elder, if it had been conquest, which it ceased to be; and that he is the *stipes* and representative; and that the foresaid case of Stewart was not fully debated, nor considered, but done without opposition; and that Craig was for the eldest brother, *Feud.* p. 245.

The Lords, not being fully satisfied with the justness of that decision in 1664, ordained this point to be farther heard and reasoned in their own presence.

But the parties agreed before any new debate. *Vol. I. Page 241.*

1682 *and* 1683. M'INTOSH of ABERDOUR *against* M'QUEEN of CORRIEBRUGH and OTHERS.

1682. *December* 5.—M'QUEEN of Corriebrugh gives in a petition against M'Intosh of Aberdour, objecting against some Lochaber witnesses, led by M'Intosh against him, for proving his spuilyie of a horse, as being notour thieves, and denounced by the Sheriff of Inverness.

The Lords refused to delay the examining of the witnesses, in regard the objections were not instructed; but, in respect of the suspicion against them, they declared they would receive any instructions for proving the objections against them, that should be adduced before advising the probation of the spuilyie. *Vide* 8th Nov. 1683. *Vol. I. Page* 198.

1683. *November* 8.—The spuilyie pursued by Macintosh against Macqueen of Corriebrugh and Others, (5th Dec. 1682,) being advised; the Lords found it proven, by the depositions of the witnesses, that the defenders spuilyied from the pursuer's cedents the goods following, of the values after specified, (here omitted as unnecessary;) the prices in all extending to 800 merks. And decern the defender to make payment of the said sum, with 400 merks more for the violent profits of these goods. *Vol. I. Page* 241.

1683. *November* 20. SIR WALTER SETON *against* CHARLES SEDEN.

SIR Walter Seton's cause with Charles Seden, an Englishman, upon a bond of 5000 merks for borrowed money by Sir Walter, and Dundass of Magdalens, (who was forfeited in 1661,) and Edmonston, was advised.

Sir Walter produced sundry accounts and bills, and receipts, under Gavin Lawry, the factor at London his hand. But the Lords repelled the compensation, and instructions of payment; and found the bills and bond (which bore for borrowed money,) did not meet; and so found the letters orderly proceeded. *Vol. I. Page* 244.

1683. *November* 22. SIR ALEXANDER BRUCE *against* The EARL of KINCAIRN.

SIR Alexander Bruce of Broomhall, pursuing a special declarator of the single escheat of the late Earl of Kincairn:

It was ALLEGED,—A stock of money he had laid in the Royal Fishery Company, was not moveable to be carried by single escheat, because it was a *jus fixum*, rendering profit like a sum bearing annualrent, which falls not under the single escheat Yet the Lord Pitmedden found such a stock simply moveable, and not like a bond upon annualrent. *Vol. I. Page* 244.

1683. *November* 22. KATHARINE CHARTERIS and ORTON *against* JEAN POLLOCK.

KATHARINE Charteris, and Orton her husband, against Jean Pollock, reported by Blair.

The Lords sustained the protestation, and found it legally extracted, notwithstanding of the want of her husband's name and designation, and that it was not taken furth also against him; seeing, in the decreet of removing obtained against her, she did not object that her husband was not called, though she proponed other defences; and it was known he had gone to Ireland and deserted her. *Vol. I. Page 244.*

1683. *November* 23. AGNES CAMPBELL and PATRICK TELFER *against* JOHN REID.

THE case of Agnes Campbell and Patrick Telfer, her husband, against John Reid, printer, being reported by Blair; the Lords advocated the cause to themselves from the Bailies of Edinburgh, where he was pursued for having stolen and abstracted, out of her printing-houses, many types and sets of letters; on this ground, That they had summarily searched his house, and, finding some, without cognoscing if they were his own or not, they imprisoned him; and the libel did not bear, "as justices of peace, or sheriffs."

Vol. I. Page 245.

1683. *December* 1. ALEXANDER GARTSHORE *against* WALKINGSHAW, WATSON, &c.

IN a competition of diligence between Bailie Alexander Gartshore, Walkinshaw, Watson, and Others, the creditors of umquhile Gavin Weir; my Lord Pitmedden preferred those creditors whose terms of payment were come at the time of their intenting actions, a little after the death of the said Gavin; and that before Gartshore, of whose debt, divided in three payments, the first moiety only was then past; and minded his own case against *Patersons*, decided *supra*, *17th July* 1678; and the case of *Charles Charters*, there cited, where arrestments on bonds whereof the terms of payment were come, though posterior, were preferred to prior arrestments on bonds whereof the terms of payment were not come; and the same will hold in other diligences.

Vol. I. Page 247.

1683. *December* 6. The WEAVERS of HAWICK *against* The BAILIES.

SOME Weavers of the Town of Hawick, to the number of nineteen, being fined and imprisoned by their Bailies, for breaking the 43d Act, Parl. 1661, by

their working linen-cloth narrower than an ell and two inches; they present a bill of suspension and charge to put at liberty: which is refused; because they had not, conform to the Act of Sederunt, 21st July 1675, by an instrument, intimated to the incarcerators that they were going to present such a bill.—Though that Act seems only to speak of creditors imprisoning their debtors by letters of caption.

Whereupon the Weavers having obeyed the Act, and intimated by an instrument; on the 11th December 1683, Forret reported the bill of suspension to the Lords: who refused it; and ordained them to depone if they had wrought any linen under that breadth; (for each was fined in £20 Scots, and imprisoned for their contumacy in not deponing, and till they should pay their fine;) though it was alleged, what they wrought under that standard was at the desire of the ladies and other owners of the webs, for their own private use, and they knew it was neither intended for markets nor to be transported abroad. Which seemed to be all that the Act of Parliament designed to obviate; yet the Lords thought it might afterwards come to markets or be transported. And they also found the Bailies competent to fine them, though only *judices pedanei* of a barony. See the Act or Proclamation of Privy Council anent manufactories and weavers, dated 11th April 1681. *Vol. I. Page 248.*

1680, 1682, *and* 1683. JAMES CLELAND and —— BAILLIE of LITTLEGILL *against* BAILLIE of LAMINGTON.

1680. *February* 4.—ONE is charged to pay a sum contained in his bond: he suspends on this reason, That he is cautioner for the charger in the equivalent; and so he ought to retain till he were relieved of his cautionry by the charger. Some thought this reason not relevant, unless he would allege that either he was distressed, or had made payment, or that the principal, who was obliged to relieve him, *vergebat ad inopiam;* see Harprecht, *ad* § *penult. Institut. de Fidejuss.;* or that he had a bond of relief from him to pay the debt betwixt and a day already past. *Vide infra, 24th July* 1680. *Vol. I. Page* 82.

1680. *July* 24.—James Cleland, merchant in Edinburgh, charges Baillie of Lamington to pay 3000 merks, contained in his bond. He suspends, 1*mo*, On partial receipts, which, being indefinite, behoved to be allowed in part of this bond: albeit Lamington was likewise owing the charger other sums by tickets and accounts; but, they not bearing annualrent, the indefinite solution must be ascribed to cut off the more burdensome debt, which bears annualrent; *L. 1 et seq. D. de Solution.* 2*do*, That he was cautioner for James Cleland, the charger, to Sir Archibald Primrose, for 4000 merks; and had from James a special bond of relief, whereby he was obliged to retire the said bond with a discharge at a term long ago bypast.

ANSWERED to this second reason,—Lamington not being distressed, he could not, on this pretence, retain James Cleland's money.

Saline found, if it had been only a naked obligement to relieve, then it could not have afforded a sufficient ground in law to have detained the granter of that obligement's money, unless he say, "distressed;" but, it bearing a specific

clause to purge the debt, and retire the bond betwixt and a day elapsed, Lamington was not bound to give any money out of his hands to the charger, till that was first done.

And it was informed that the Lords had so decided lately betwixt *Sir Patrick Nisbet of Dean* and *The Earl of Northesk*. *Vol. I. Page* 110.

February 21.—The Lords, on Saline's report, allow Lamington to propone on the right in Littlegill's person, and James Cleland to propone upon his right from Mr William Somerville, and that the Lord Reporter hear them in the competition of the two rights: and, if James Cleland's right from Somerville shall be sustained as preferable to the other right, then the Lords allow James to pass from Littlegill's right standing in his person, and whereof he formerly made use, but was stopped with the pretence of compensation of Littlegill's counts, as once curator to Lamington. And decern in favours of the said James Cleland.

Yet James Cleland took this assignation from Somerville *pendente lite*, when *nihil est innovandum*. *Vide infra, 24th March* 1682. *Vol. I. Page* 175.

1682. *March* 24.—The Lords, on Saline's report, decern in favours of James Cleland, against the Laird of Lamington and his Cautioners; superseding extract of the decreet till the 1st of January next; betwixt and which time, if the Laird of Lamington, by the event of the count and reckoning betwixt him and Baillie of Littlegill, who is James Cleland's cedent, anent his curator accounts, shall liquidate the sum due by Littlegill to him,—then declare that he shall have allowance thereof from James Cleland, his assignee, in the fore end of the sums, now decerned; and, in case he shall not liquidate the same betwixt and that time, ordain this decreet to be extracted by James Cleland, without further delay: and the Lords declare they will grant no farther diet to Lamington.

This would only seclude him from his compensation against Cleland; but not against his pursuing of Littlegill. *Vide infra, 23d December* 1682. *Vol. I. Page* 180.

1682. *November* 9.—The Lords ordained James to produce his account-books, (which was judged hard, to propale a merchant's book,) that it might be compared with the sum in the bond insisted on; in respect he had given an obligement to allow what errors Lamington should instruct in his count. But this means only errors *in calculo*. *Vide 23d December* 1682. *Vol. I. Page* 193.

1682. *December* 23.—The Lords,—on a bill of Lamington's, pretending he was doing diligence to finish his count and reckoning against Littlegill, (though he had not stirred in it till within these last eight days,)—prorogated the time again to the first of February next, with this renewed declaration, That they would allow him no further time. *Vide infra, 9th January* 1683. *Vol. I. Page* 204.

1683. *January* 9.—In a bill presented by James Cleland and Baillie of Littlegill against Lamington, (*vide* 23d Dec. 1682;) the Lords refused to put Lamington to a new process against Littlegill for his father's curator accounts. But, in regard that Littlegill alleged the act of count and reckoning proceeded without his knowledge, and that it was *res inter alios acta*, as to which he was neither called nor heard, they allowed him yet to propone what new matter he had to say against that act of litiscontestation which had past

in the count and reckoning betwixt James Cleland and Lamington, (*de quo vide supra*, 27th January 1680;) and in the mean time they stopped Lamington's extracting that act, till they saw what Littlegill could add or alter thereof.

Vol. I. Page 205.

1683. *December* 8.—Baillie of Littlegill, and James Cleland, merchant, as he who stands bound for Littlegill to Lamington, that he shall clear his father's chamberlain counts with the Marquis of Douglas, (for which Lamington's grand-father was cautioner,) give in a bill to the Lords, craving a protection to Littlegill for a month, (conform to the late Act of Parliament in 1681,) against his creditors, that he might come in and clear these accounts, it not being possible for Cleland to do it without him.

The Lords found this case fell not within the terms of the said Act of Parliament; and therefore refused the bill. *Vol. I. Page* 249.

1682 *and* 1683. Bailie of Torwoodhead, *alias* Lord Forrester, *against* Edward Ruthven or Hugh Wallace.

1682. *December* 14.—At Privy Council, Bailie of Torwoodhead *gives in* a bill against Edward Ruthven, and the Lady Letham and others, for dispossessing him of the house and estate of Corstorphine, whereof he was heir of tailyie; and therefore he craved repossession, and delivery to him of the charter-chest.

The Lords, in regard he was dispossessed by their own order, (*vide supra*, 18th September 1679, *Historical Volume*, Letham *against* Forrester,) therefore they refer him to pursue *via ordinaria* before the Session; but recommended it to the Lords to discuss it summarily.

The pretence of their not meddling with it was, that Edward Ruthven, then out of the country, was not cited; he is since dead, and any right he had falls to his two sisters.

Nota.—Torwoodhead, 30th March 1683, was repossessed in the house and yards; reserving the point of right to be discussed afterwards; and but prejudice of Hugh Wallace's comprisings thereof, which are reserved as accords.

Vol. I. Page 201.

1683. *December* 10.—Bailie of Torwoodhead, *alias* Lord Forrester, his debate with Hew Wallace, (mentioned 14th December 1682,) is reported by Pitmedden; and the Lords find that they will not continue Forrester's possession of that tenement lying in Forrester's Wynd, in Edinburgh, to him, as apparent heir of tailyie to James last Lord Forrester; because Hew Wallace instructed he was infeft in it; and therefore *una voce* found Torwoodhead behoved to warn him to remove at Whitsunday next.

But this he cannot do except he were infeft. *Vol. I. Page* 250.

1683. *December* 12. The STEWARD of PERTH *against* ———.

A CAUSE of Steward of the Stewartry of Perth, under my Lord Perth, was reported by the Clerk-register, craving a modification of £100 Scots of fine imposed by him for a petty riot of taking away two pecks of corn; seeing such fines ought not to exceed £50. ANSWERED,—In a former suspension now discussed, where they debated his jurisdiction, this was competent and omitted.

REPLIED,—Competent and omitted does not hold in suspensions. DUPLIED,—That does hold, if the craving the abatement of the fine as too exorbitant had not been a libelled reason of suspension in the very letters of suspension, but not insisted on at the debate.

The Lords found he could not crave a rectification or restriction of the fine now. *Vol. I. Page 250.*

1683. *December* 15. ANDREW FOSTER *against* MERSTON.

ANDREW Foster, bowmaker, and Merston, having mutual processes, they submit them to two arbiters, and give in jointly a bill craving the Lords may empower the arbiters to examine witnesses before them; which the Lords refused.

Yet Stair, in his Decisions, at the *6th* of *January* 1670, *Ker* and *Scot*, shows the Lords granted it then. *Vol. I. Page 250.*

1683. *December* 15. The CREAMERS of EDINBURGH *against* The MAGISTRATES.

THE Dean of Guild of Edinburgh discharging the Creamers to sit within the Parliament House, seeing there were several shops standing empty within the Town, whither they might remove:

The Lords, upon a bill, continued their possession till further orders, and that some of the Lords' number might meet with the Magistrates thereanent. *Vol. I. Page 251.*

1679 *and* 1683. JAMES WOOD *against* PATRICK REID.

1679. *January* 15.—IN the case betwixt Mr Patrick Reid and James Wood, merchant; upon the report of Lord Newton, the Lords assoilyied from the reduction, in respect of the three decreets, and bond of corroboration; and allow the defender, Mr Patrick, to go on in his execution; he finding sufficient caution, that, in case James Wood shall prevail in his declarator, he shall refund to him so much of the sums as he shall be found to have right to. As also sustain the declarator at James Wood's instance; and find the sums affectable with the debt whereunto he hath right, unless Mr Patrick Reid can

instruct he hath right to the said sums for an onerous cause, before the pursuer James Wood's right to the said debts, and that otherwise than by his own oath; and find that the onerous cause of his wife's mother's contract of marriage, condescended on by Mr Patrick, is no such onerous cause as to sustain Mr Patrick his assignation and right. But, as to the funeral charges, and aliment furnished to Andrew Balfour, his wife's father, during the time of his imprisonment, the Lords declare they will sustain the same, in so far as it shall be instructed, in such manner and way as things of that nature can be proven. *Vide infra*, 10th Jan. 1683. *Vol. I. Page* 33.

1683. *January* 10.—The Lords, on Castlehill's report, found that the bond of corroboration given by Wood was elicited and extorted *per vim et metum*, because in the messenger's hands; and did not put James to prove that he was then in prison; and therefore reduced the bond, unless Mr Patrick proved some onerous cause of it.

There are two cases wherein bonds granted *metu carceris* are not reputed such final transactions but they may be quarrelled, 1*mo*, If the imprisonment be found unjust and illegal. 2*do*, If the first bond or decreet (whereof the corroboration is given in prison) did labour under some defects or nullities, or stood discharged, and these were not known or were not communed at the time of granting the bond of corroboration. *Vide* 16*th January* 1683, *Tolquhon.* *Vol. I. Page* 206.

1683. *December* 20.—Captain James Wood's action against Mr Patrick Reid, mentioned 15th January 1679, was reported by Castlehill. The Lords repelled the right Mr Patrick founded on, acquired from Sir George Nicolson of Kemnay, (for which he paid him 2000 merks,) as no sufficient onerous cause to sustain his disposition from his father-in-law Andrew Balfour; because the right he had taken from Kemnay was 17 months posterior to James Wood's right of his escheat. *Vol. I. Page* 252.

1683. *December* 22. GEORGE ALEXANDER *against* MORISON of BOGNIE.

MORISON of Bognie having, in passion, called Mr George Alexander, advocate, a cheat; he complains to the Lords of Session, and leads Mr Robert Colt, and another, who heard it, as witnesses; and on this probation the Lords ordain Bognie to crave him pardon in their presence, (to the intimation of which they called in all the advocates;) and to pay 100 merks of fine to the poor, and to lie in prison during their pleasure: but he absented himself. See the like case in Stair's Decisions, 14*th July* 1668, *Mr David Falconer* against *Sir James Keith.*

In England, upon such complaint, a man gets some part of the fines to himself, as we see in the pursuits lately made on the Statute called *scandalum magnatum*; which were just to be introduced also with us. *Vol. I. Page* 254.

1683. *December 22.* JOHN CALDERWOOD *against* SCOTT of LOCKGUARRET.

MR John Calderwood against Scott of Lockguarret being advised, the Lords found, from the depositions taken in the incident, and the writs produced by the pursuer, and defender, that the missive letter produced is fully astructed to be the hand-write of Andrew Calderwood; and repel the exception of improbation *hoc loco,* as not now competent *post conclusionem in causa;* the said missive having been produced *in modum tituli ab initio*; reserving action of improbation as accords of the law. And find the pursuer's title is now astructed by production of the principal bond, and that the oaths taken in the incident do not prove payment; and find the general discharge produced does not meet, not being granted for debts and cautionries due by umquhile Walter Scot to umquhile James Calderwood, but only in relation to debts betwixt umquhile James Calderwood and James Scot; but sustain the compensation for the sum contained in James Calderwood's ticket, the defender proving the same to be holograph, and condescending upon that part of the count-book produced, where the like sum for the same cause and year of God 1653, expressed in the ticket, was counted for and stated. As also sustain the receipt under Bailie William Scott's hand, discharging a part of the said sum, to elide the ticket *pro tanto,* the pursuer always proving the said holograph receipt to be the hand-write of the said William Scot, and assign the 10th of January next for proving; and grant diligence to both parties for that effect; but decern for the superplus above what is craved to be compensed.

Vol. I. Page 254.

1684. *January 4.* ROBERT HAY of DRONLAW *against* The EARL of STRATHMORE.

THE Lords, before answer, ordain the Earl to depone, if, or not, at the time of the communing on the disposition of the lands of Dronlaw, there was any mention made of the teinds; for Mr Robert Hay alleged there was none.

Vol. I. Page 256.

1684. *January 8.* WILLIAM RUSSEL and BETHIA LESLIE *against* GEORGE MARSHAL and BETHIA ELIES.

THE Lords, on a bill given in by William Russel, writer, and Bethia Leslie his wife, against George Marshal and Bethia Elies, reponed William against the circumduction of the term, and gave him to the 1st of February to bring in the witnesses and the commoners, if his wife's renunciation was given *intuitu* of the additional liferent given her by Stanhope-milns the tutor; and prorogated the term to the said 1st of February. *Vol. I. Page 257.*

1683 *and* 1684. JAMES ALSTON *against* FRANCIS ROSS.

1683. *February* 1.—JAMES Alston against Francis Ross, pewterer in Edinburgh, reported by Castlehill. The Lords found the 8th Act of Parliament 1672, discharging Magistrates of Royal Burghs to arrest strangers, is only in favours of natives, not citizens, and not of foreigners; and that, notwithstanding of the said Act, such strangers may be arrested: but allow Ross the defender to prove it, as a relevant defence, that Macqueston, the person arrested, for whom he became caution, was *origine Scotus*, and had fixed a domicile here, forty days before he was arrested. Which being proven, they found the arrestment unwarrantable; seeing Alston had his bond for the debt, and so it was not merely due upon an account. And, before answer, ordained Ross to depone if he had any effects then in his hands belonging to Macqueston. *Vide* 8th January 1684. *Vol. I. Page* 215.

1684. *January* 8.—The Lords having advised the probation in James Alston's action against Francis Ross, the pewterer, mentioned 1st February 1683, found it not proven by Ross's witnesses that M'Queston was born a Scotsman, or did reside a year in Scotland before the date of his arrestment (which was quarrelled on the 8th Act of Parliament 1672, as now illegal,) and of Ross's bond of cautionry to present him to the Magistrates of Edinburgh: and therefore found the letters orderly proceeded against him.

Vol. I. Page 257.

1683 *and* 1684. SIR WILLIAM PURVES *against* JAMES KEITH and The EARL of MARISHALL.

1683. *December* 20.—SIR William Purves, his Majesty's solicitor his action againt Mr James Keith and the E. of Marishall was advised. The case was, Sir William Purves long ago disponed a comprising of my Lord Gray and Lord Marishall their estates, to James Allan, writer to the signet, who, in the warrandice, takes him obliged not only to warrant the formality and legality of the executions of the denunciation of the apprising, but also the reality, verity, and truth thereof. Thereafter, Mr James Keith, also a writer, having acquired the right of this comprising from James Allan, not for his own behoof, (as was thought,) but for the Earl of Marishall's use, he designedly, (as is affirmed,) to come back upon Sir William Purves for his special warrandice foresaid, causes another appriser of Marishall and Gray their estates, raise a reduction and improbation of Sir William Purves's apprising against Keith himself, as now having right thereto. And though, in law, after 24 years from the date of an apprising, one is not bound to produce the executions of his comprising, seeing the same messenger who denounces the lands, is ofttimes also judge to the decreet of apprising, and that they are loose papers easily exposed to perishing; yet if they be produced, they may be improven as false. And so Mr James Keith tamely produces the executions and all. And the two witnesses therein being examined, they depone, they do not remember that they were adhibited witnesses to that execution, or knew that messenger, or were ever upon the

ground of these lands. Whereon the Lords improved the execution and found it false, (which is hard :) and so, the apprising falling *in totum*, Mr James Keith recurs back upon Sir William Purves, on the special conception of his warrandice, which he had inadvertently given too large. On this Sir William Purves raises a reduction of that decreet of improbation, on thir three grounds:—1*mo*, That Mr James Keith had lost his right, because, by the 214th Act 1594, members of the Session are discharged to buy pleas; *ita est*, there was a depending process on this when he took a right to it from James Allan.

ANSWERED, for Mr James Keith,—1*mo*, He was not then a writer, for he had deserted his employment about a year or two before. 2*do*, By his acquisition, *non fecit conditionem adversarii deteriorem et duriorem*, (which is the reason of law against these purchases;) for he had bought it from Mr Allan, another writer; and Sir William Purves, his author, was also a member of the Session; and so they were as ill with him; *et privilegiatus contra privilegiatum non utitur suo privilegio*. But, 3*tio*, *Esto* he were in the case of the Act of Parliament, the most that could be inferred from the Act, is not losing of the causes, but only deprivation; even as a beneficed person's tacks set for a longer time than is allowed by law, are not declared null by the act of Parliament 1617, but only the setters are declared infamous. See Dury, 16*th November* 1624, *Hope* against *The Minister of Craighall*.

And as the 133d Act, Parliament 1584, discharging ministers to be notaries, except in testaments, *non procedit annullando actum*; even so, here, all the certification adjected to the Act is only the deprivation of the buyer; as was decided by the Lords in 1611, *Maxwel of Drumcoltrain*; and on the *penult.* of *July* 1635, *M'Gill*, observed by Dury. See Stair, *tit.* 10, Of Conventional Obligations, § 64; and Hope's Tractate on Reductions; as also Vinnius, *lib.* 1, *quæst. illust. cap.* 1, who is clear *ubi lex procedit non annullando actum sed irrogando aliam pœnam*, that there the Act subsists, and the *pœna* is only due.

It was ANSWERED,—Though the said Act mentions only deprivation, yet the said emption must be also null: 1*mo*, Because the Act is conceived in thir terms: "It shall not be leisome," *id est, erit illicitum*. If so, then it is *contra legem, et ergo ipso jure nullum*; at least declarable to be null in a reduction. 2*do*, *Loco pœnæ succedit damnum et interesse partis*; which is here the whole cause and value of the plea itself. 3*tio*, Vinnius, *ibid.* says, *pœna nonnunquam adjicitur etiam annullationi actus*: and so it is both null and punishable.

Yet the Lords found the said Act of Parliament proceeded *non annullando actum seu emptionem, sed tantum ad irrogandam pœnam*; and that the tract of the Lords' decisions had hitherto expounded it so; and confessed there were great inconvenience in sustaining such sales, but they could not redress it, that being work for a Parliament; and that Judges, tied to the laws as they were, had not power to alter laws *ob incommoda* urged against them; and that arguments *ab incommodo* ought not to move Judges to recede from established laws.

Quæritur if the Acts of Parliament discharging penal statutes, or the Act of Grace in March 1674, discharges also the penalty of this Act against buying pleas. 2*do*, If lands in dependance be gifted, the acceptation does not seem to fall under the compass of the prohibition of this Act. 3*tio*, If the disposition or assignation to a *res litigiosa* be *ex causa necessaria*, as for relief of cautionry or payment of debts, it will not hinder but I may purchase them.

4*to*, *Quæritur* where lands are under plea, and one takes a disposition to them to a member of the Session in trust upon a back-bond, if this would be a violation of the Act, seeing this is not a formal buying. Yet this course would elude the Act.

Sir William Purves's *second* reason of reduction was, That this transaction, made and acquired in by Mr James Keith, was to the Earl of Marishal the debtor's apparent heir's behoof. This being denied, the Lords, before answer, ordained Mr James Keith, the Earl of Marishal, and any others Sir William Purves condescended on, to be examined anent the trust.

The *third* reason of reduction was, That nothing should take away the executions of a comprising, especially *post tanti temporis intervallum* as twenty-six years, except the clear liquid and positive depositions of the messenger and witnesses denying that they were ever employed in such an act: but here they are not positive, but only as to their memory, which may easily forget after so long a time; and that it is probable they were witnesses; for they dwelt in the very next land to thir lands denounced and apprised, and it is ordinary to take the witnesses from the neighbourhood.

This third point was not then decided. *Vide* 10th January 1684.

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1684. *January* 10.—In the case between Mr James Keith and Sir William Purves, mentioned 20th December 1683; the Lords examined *Sir George* Lockhart, Sir John Dalrymple, Mr David Dewar, Mr George Bannerman, and the Earl of Marishall's other advocates, what they knew of the Earl of Marishall's trusting that comprising in Mr James Keith's name; yea, what they believed in their private judgment, and to whose behoof they thought it; which was to cause them depone on their fancy and opinion. But it was judged not convenient to shroud themselves under that privilege of advocates, *ne teneantur secreta clientum detegere;* seeing this was the detection and expiscation of a fraudulent conveyance, which it is not an advocate's credit either to advise or conceal.

Mr David Dewar discovered all, that it was for the Earl's behoof; and that he was against the acquisition of it. *Vol. I. Page 258.*

1684. *January* 11. DAVID SIMPSON *against* JAMES PITTILLO.

THE Lords, upon Saline's report, in respect of the oath of David Simpson in Dysart, acknowledging that the 500 merks were allowed to him in part payment of the price of the lands disponed to him by M'Ghie, and so not chargeable on Pittillo, and in respect of the discharge of 400 merks granted by M'Ghie, before the assignation made by him to Simpson, they reduce the decreet-arbitral as unjust; reserving to Simpson to insist against Pittillo, on any other grounds, as accords of the law.

Then Simpson offered to improve the discharge as false. *Vol. I. Page 259.*

1683 *and* 1684. SIR JOHN SEATON of Garmilton *against* SIR ROBERT SINCLAIR of STEVENSTON.

1683. *March* 14.—BETWEEN Sir John Seaton of Garmilton, and Sir Robert Sinclair of Stevenston; the Lords found Garmilton could have no other servitude on Stevenston's land for his mill-dam, save what he has been in possession of; and assoilyied Stevenston from damages. But see this altered 30th current. *Vol. I. Page 225.*

1683. *March* 30.—The Lords alter the interlocutor of the 14th current, and found Stevenston liable to refound and make up Garmelton's damage, that the water ran not towards his mill as it was wont to do: though all the servitude which Stevenston owed him in law was only a *nuda patientia* through his ground, and that the channel of the water was diverted *casu* and by speat, without any fact or deed on Stevenston's part, and could not be returned to the former channel. *Vol. I. Page 231.*

1684. *January* 11.—Sir Robert Sinclair, upon a new advising, is assoilyied from the damages libelled by Sir John Seaton of Garmilton, as done to his mill. Anent which, *vide* 30th March 1683. *Vol. I. Page 259.*

1684. *January* 12. JEAN CALLANDER and her HUSBAND *against* SIR ANDREW BIRNY, LORD SALINE, &c.

THE cause, Jean Callander, and her Husband, against Sir Andrew Birny, Lord Saline, and his Children, took up the whole forenoon in advising; and the Lords, from the writs and depositions, repelled the defence founded on Gray of Wariston's apprising, assigned to Torwoodhead, and the gift of escheat; in respect of the answer, that Alexander Short was denuded in favours of the Lord Saline, before the date of the apprising and denunciation to the horn: which they find proven, by comparing the date of the said writs with Saline's rights, as it is narrated in the decreet of preference produced; as also, they repel the defence founded on the certification, in respect the bond was produced before the said decreet of certification was extracted; and repel the defence founded on the decreet of preference produced, because they find, by that decreet, that the defenders were only put in possession till the rights were cleared; and repel all the other defences founded on Oliver Murray, her last husband's intromission with the money or rents belonging to James Short, in so far as the same is obtruded to the pursuer's infeftment of liferent of the annualrent of the bond of 2400 merks since her husband's death; which they find her husband could not innovate nor discharge to her prejudice, the bond being originally granted to her in liferent, and the husband standing debtor to her before by her contract of marriage, in so far as she is not satisfied otherways of the same. And likewise repel the defence founded on Robert Andrew's money, paid to the husband; in respect of the answer, that Oliver the husband had right from a third party, and that there is no trust proven: but prejudice

to the defenders to declare the trust, as accords. And they sustain the defence founded on the L.1000 bond, and the precept and receipt thereof; as also the defences founded on Stirling of Herbertshire and Oliver Murray's intromission with the rents of the lands, to extinguish Herbertshire's adjudication, and to affect the fee of the heritable bond *pro tanto*. And find it proven, that Herbertshire and Oliver Murray did intromit with the rents of the acres, from 1673 inclusive to 1678 exclusive; and that Lord Saline did enter to the possession the year 1678; and that the rents of the said acres so possessed, are 45 bolls of bear yearly, L.16 of money, and a dozen of fowls; out of which there is to be deduced 9 bolls to the minister, and L.9 of feu-duty paid to the Town of Stirling, superiors, and the cess, which they allow according to the fiars; and remit to the Lord Kemnay, who heard the cause, to consider and regulate the said deductions, and to hear the parties on any other grounds of re-compensasation, and to do therein as he finds just, and to order the decreet to be extracted accordingly.

Saline having given in a bill against this, and the same being answered; the Lords advised both on the 14th March, and found that Herbertshire's adjudication does not fall under the decreet of certification extracted by the petitioner; and that the pursuer needs not produce Herbertshire's commission from the Lords of Session, in respect the same is related to in the depositions of the witnesses adduced by the pursuer, and in the discharge granted by Herbertshire to the tenants, likewise produced by them; and also find that the pursuer is not obliged to produce her contract of marriage; and that the L.1000 intromitted with by Oliver Murray, must be applied for extinguishing the sums of the adjudication, in so far as the said L.1000 did exceed the annualrents due to the said Oliver, the time of his receipt of the said L.1000; and remit to the Lord Kemnay to order the count accordingly.

Then, on Saline's new bill, the Lords, on the 21st March, adhere to their former interlocutor; only they ordain the Ordinary, in the calcul, to restrict Herbertshire's apprising to the principal sums, annualrents, and just expenses, in place of sheriff-fees and penalties, at his modification.

Then, on the 22d and 27th March, on new bills, the Lords refused to stop the going out of the decreet, reserving to the defenders their action of declarator, on the grounds of their bills, as accords; but discharge the giving out of the decreet, until the Lords Harcus and Drumcairn order it to be delivered to the pursuer; to which two, the Lords recommended to endeavour to agree the parties.

And accordingly they forced the pursuer to agree and accept of less.

There was also another answer to that first defence of Gray's apprising, *viz.* that it was extinct by a renunciation, upon payment, given by Gray's tutors; but that they were afterwards induced by Saline to take back their renunciation, and give an assignation of it to his son-in-law, Baillie of Torwoodhead; which answer was also relevant. *Vol. I. Page* 259.

1684. *January* 16. GORDON of ROTHEMAY, and —— BARCLAY *against* COLONEL FULLARTON and LORD BOYNE.

GORDON of Rothemay and —— Barclay, heretrix of Towie, his Lady, against Colonel Fullerton, and my Lord Boyne, who married the said heiress's mother, reported by Saline.

The Lords found that Colonel Fullerton, being the posterior tutor to the said Lady Towie, ought to have called her mother, (who was afterwards Lady Boyne,) her prior tutrix, to an account, notwithstanding she had obtained a decreet of exoneration of her office and intromissions; but, in respect of the decreet of exoneration, they remit to the reporter, before answer, to hear the parties on the articles of the condescendance of the pursuer's lesion (when minor) given in, and to report; and ordain the Colonel to produce the contract betwixt him and the Lord Boyne, and to condescend on the expenses at law depursed by him on the minor's affairs. *Vol. I. Page* 260.

1684. *January* 17. ROBERT SANDILANDS *against* JEAN HERIOT, Lady Ramorney, and JOHN CRAIG.

ROBERT Sandilands, merchant in Edinburgh, against Jean Heriot Lady Ramorney, and John Craig, her son. The Lords, on Forret's report, decerned against the son; but, in regard he was a child, superseded all personal execution against him till he was 18 years old. And, for the Lady, found her letter produced contained no obligatory words against her, to make her liable for her husband's bond acclaimed; they being only spoken *impersonaliter, et in tertia persona*, that she hoped shortly course should be taken with her husband's debts, and desired him to forbear, but did not promise that she would take course with it; and therefore the Lords assoilyied her, in respect she was confirmed executrix-creditrix to her husband, on her contract of marriage, which was not fulfilled *aliunde*. *Vol. I. Page* 261.

1684. *January* 17. ALEXANDER and CHARLES MAITLAND *against* RODERICK DAVIDSON.

THE competition between Alexander and Charles Maitlands, the macers, and Roderick Davidson, who had got a posterior gift of it from the King, as vacant by the deprivation of Alexander Maitland, the father, from all offices, upon the mint decreet, being reported by my Lord Carse;—the Lords reccommended to two of their number to endeavour a settlement.

In this process, Charles Maitland gave in a declinator against my Lord Register, that he should not vote, because he had procured that gift to his man Roderick Davidson. Charles having alleged he was conjunct *dominus* of the place with his father, and, on his deprivation, that his right stood good;—it was

ANSWERED, That they could not be both *domini in solidum, per l.* 3, § 4. *D. de Acquir. et Amit. Poss.*; and so the possession could not be both in the father and in the son. *Vol. I. Page* 261.

1684. *January* 17. ——— GIBSON, MINISTER at AULDHAMSTOCKS, *against* The MINISTER of COCKBURNSPATH.

IN a debate between —— Gibson, Minister at Auldhamstocks, and ———, Minister at Cockburnspath, as to the possession of vicarage and teind-herring; the Lords sustained a decreet as a sufficient probation, though the other minister claiming right was not at all called thereto. *Vol. I. Page* 261.

1684. *January* 17. The COMMISSARIES of EDINBURGH *against* The ARCHBISHOP of ST ANDREW'S and the BISHOP of EDINBURGH.

THE four Commissaries of Edinburgh pursue the Archbishop of St Andrew's and the Bishop of Edinburgh, for paying the locality imposed upon them, when the said Commissaries quitted (in 1609) the confirmation of the great testaments through Scotland, to the respective diocesan Commissaries, *viz.* £606 Scots. The question fell in between the two defenders.

St Andrew's ALLEGED,—The Bishopric of Edinburgh was, in 1633, erected out of his See, and with this quality, That the titular Bishops of Edinburgh should relieve him of a proportional part of that contribution-money; and that, by a decreet-arbitral, in 1670, the Bishop of Edinburgh's proportion was declared to be the half, *viz.* £303; and that this Bishop's predecessors, *viz.* Wiseheart and Young, were in use of paying it 13 years; which was *triennalis et decennalis possessio*, and so was sufficient to liberate the Archbishop, a churchman, from that proportion.

ANSWERED for the Bishop of Edinburgh,—That the quota and proportion of the half imposed on his See was too great, considering the vast disproportion of the two Bishoprics' rents; and he denied the Commissaries were in possession; but, *esto* his predecessors had paid it, they being but administrators of the benefice, that cannot prejudge him.

REPLIED,—His erection is burdened with a proportion; and, *ex* § 1. *Intitut. de Societate*, where the parts are not defined, *præsumuntur esse æquales.*

The Lords, on this debate, found there was due to the Commissaries of Edinburgh, betwixt the two, £606; but, before answer, what part of this should be paid by the Bishop of Edinburgh, they ordained probation to be led of the Commissaries' possession, and their getting payment from the preceding Bishops of Edinburgh; and how long,—if the length required by the foresaid *regula cancellaria; item*, how much of the revenue and patrimony of St Andrew's was dismembered, taken off, and incorporated into the Bishopric of Edinburgh, that they might thereafter consider if the equal division of the total £606 between them was just and rational. *Vol. I. Page* 261.

1684. *January* 19. The EARL of SOUTHESK *against* ROGER SOFTLY, &c.

THE Earl of Southesk's action against Roger Softly of Holmes, and others, or multures, was this day advised; and the Lords restricted the process to the years since the pursuer's infeftment produced, *viz.* 1659, reserving to the pursuer to insist in another process for the years preceding the same; and sustain process for all years since the citation, and for five years preceding it, because of the quinquennial prescription of multures introduced by the Act of Parliament 1669; which allegeance of prescription for any years after the said Act of Parl. they sustain; and find the astriction and quantities proven against the said Roger by the decreet produced, and decern against him for the space of 12 years, during which space he acknowledges he has possessed. And also find the astriction and quantity proven by the decreet produced, against Maxwell of Cowheath, Brown of Nunland, and Maxwell of Hills; and assign the day of next, to their procurators to produce them, to depone anent the time of their possession; the said Maxwell of Hills his oath being only resiled from as to the having of writs, but not as to any other point in the process.

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1684. *January* 19. BRODIE of MILTON *against* ROBERT SCOT.

IN a case between Brodie of Milton, and Mr Robert Scott, minister at the Abbey of Holyroodhouse; it was reasoned among the Lords, whether the raiser of an improbation, standing infeft in lands, could call for any bonds, or wadsets, &c. granted by any person whom he no ways represented, nor could succeed to *jure sanguinis*. The solider part of the Lords argued, that he could not; else a compriser might insert a third party's lands in his comprising, and, without instructing his debtor's right to them, force him to produce his whole charter-chest and writs; which was absurd. Others said, the design of improbations was to secure heritors in their rights of lands, and to remove all impediments that stood in his way; and what way could a man secure himself against such rights otherways?

It is ANSWERED,—Proprietors had interest and power to put all lets out of their way, but they must do it *habili modo*; for they had not interest to improve such rights, but all they could do was, in a reduction and declarator, to annul them as flowing *a non habente potestatem*; and principles of form and material justice should not be thus questioned nor loosed.

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1684. *January* 24. WALTER BURNSYDE *against* WILLIAM BROWN.

MR Walter Burnsyde's action against William Brown, late agent to the Burrows, being reported; the Lords ordained William, either to produce the comprising, and the grounds whereon it proceeded, or else to consign, in the

clerk's hands, the money for which the comprising was led. In which case, they would admit Captain Hume of Foord's interest, to prove the comprising was extinguished, or satisfied in whole or in part. *Vol. I. Page* 268.

1679, 1680, *and* 1684. JOHN HOPE of HOPETON *against* GEORGE YOUNG and The EARL of WINTON.

See the prior part of this case, Dictionary, page 15,718.

1679. *February* 26.—JOHN Hope of Hopeton pursues a declarator of fraud and circumvention against the Earl of Winton and George Young, for reducing the said George his rental and prorogation of some lands in Winchburgh. (*Vide* 17th July 1678.) ALLEGED,—You Hopeton can never quarrel this, because you have taken the disposition with the burden of this right of George Young's, and have expressly excepted it, that it shall not be leisome for you to quarrel it upon any ground, but only not payment of the tack-duty.

REPLIED,—The reason of that was, because the Earl alleged he would be liable in warrandice to George if it were not excepted. Now this was a circumvention; for the rental was to my Lord's own behoof.

This being reported, the Lords repelled the reason of reduction, in respect of the clause *in grœmio* of Hopeton's own disposition.

Then Hopeton gave in a bill, craving my Lord's oath, and of the communers at the bargain, on this,—if he did allow Hopeton to quarrel that rental, providing the warrandice should not recur against him; and that it was not a true date, and was not then delivered.

The Lords ordained the Earl to depone thereon, in presence of the communers if they pleased; which he did before Sir John Dalrymple, Sir Walter Seton, Mr Archibald Hope, and Doctor Livingston, and denied it: which being advised, the Lords assoilyied from the reduction.

Some Lords were of opinion, that, being a circumstantial circumvention, it was both just and necessary the Lords should have examined the communers; but the Lords dispensed with this, (which in other cases they would have done,) from their deference to my Lord Winton. *Vol. I. Page* 45.

1680. *February* 24.—In Hopeton's suspension against the Earl of Winton, (26th Feb. 1679;) the Lords found, that Hopeton having bought Winchburgh, &c., by a rental, and at the tail of it having declared himself satisfied therewith, he could not now retain of the price either upon the account that he offered to prove that some acres were twice charged, or that there were some called 14 acres, which after measure would not be 10, seeing in these cases *caveat emptor*, and he may gain as much upon the measure of other acres. And they would not burden the Earl to prove they were commonly holden and reputed so many acres. *Vol. I. Page* 87.

1684. *January* 24.—The Laird of Hopeton's case against George Young in Winchburgh, being reported by Kemnay, the Lords adhered to their former interlocutor, dated the 17th July 1678, finding the duty contained in the rental

and prorogation to be for both stock and teind; the defender proving his use of payment, and the Earl of Winton's receiving of that duty.

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1684. *January* 26. The MINISTER of ——— *against* GLENURCHIE, now EARL of BREADALBANE.

THE Minister of raises a reduction, against Glenurchie, now Earl of Breadalbane, of a tack of his teinds which he had set him at the time he did present him to be minister of that kirk; as a simoniacal paction, to the prejudice and dishonour of the church. ANSWERED,—Whatever may be reputed simony by the Canon Law; yet, with us, by the first Act of Parliament 1612, such tacks set by ministers are declared not to be simony, providing he leave to himself and succeeding ministers a sufficient maintenance.

Which, I think, from other Acts, may be interpreted to be eight chalders of victual or 800 merks of money; and that, whether it be *pactum honestum* or *turpe, non refert*, (neither should the setter who is *in pari turpitudine* quarrel it;) seeing all the patrons of Scotland use it at their presenting, and the foresaid act allows it.

This was not decided, but the bishops were very zealous, and threatened they would have these tacks annulled as simony. *Vol. I. Page* 265.

1684. *February* 5. LESSILS and SPOTSWOOD *against* CARMICHAEL and BORTHWICK.

LESSILS and Spotswood against Carmichael and Borthwick being reported by Edmonston; the Lords turned the decreet of the Bailies of Haddington into a libel, because it held a married woman as confessed upon her oath, as contumacious; seeing it was *partes judicis* to know that she was not obliged to depone; but allowed them yet to prove her possession, with this declaration, That, if it shall be made out against her, they will modify large expenses for her reclaiming against this decreet, now turned into a libel. *Vol. I. Page* 267.

1684. *February* 5. HOME of COLDINGHAMELAW *against* KER of MORISTON.

THE Lords found it proven, by the tack and other documents produced, that Moriston's apprising of the said law was in trust, except as to the sum due to himself; and therefore ordained Moriston to count and reckon.

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1684. *February* 6. COLONEL WHITEFOORD *against* The BISHOP of GALLOWAY'S VASSALS.

Colonel Whitefoord pursuing several vassals of the Bishopric of Galloway, (whereof his father was bishop in 1630,) for payment of teind-duties, out of the lands now possessed by them;—ALLEGED,—Teinds are not *debita fundi;* and unless he offer to prove that they represent, by some passive title, the persons who possessed these lands, during the years he claims, he cannot convene them. ANSWERED,—It is presumed their father possessed the teinds, unless they prove that another did draw these teinds, or had a right thereto.

The Lords, on Pitmedden's report, found the Colonel behoved to condescend and prove that the persons whom they represent did specifically possess these lands and uplift the teinds, the years libelled. *Vol. I. Page* 267.

1684. *February* 6. LORD MELVILLE *against* JAMES WILLIAMSON.

AT the Commission for Plantation of Kirks, my Lord Melvil reducing a decreet of augmentation obtained against him by Mr James Williamson, minister at Kirkcaldy, of 100 merks yearly, and converting oats to bear; the Lords sustained his decreet, and assoilyied from the reduction; because, though there was a new church erected at Abbotshall, and taken off Kirkcaldy, yet that could not prejudge the *ecclesia matrix* from which it was dismembered, especially seeing Melvil paid no communion elements to the kirk of Abbotshall.

I heard it questioned at this time, if a minister be seeking an augmentation who has not full eight chalders of victual, or 800 merks of money, and there be no free teinds unexhausted in the parish, but only *decimæ inclusæ*; whether will they be burdened, or will the minister be sent to the *remedium extraordinarium* of affecting free unprivileged teinds *non inclusæ* of the adjacent parish, as the minister of North Leith got off the West Kirk parish. *Vide infra, 12th March* 1684, the case of *Tulliallan and Culross.* *Vol. I. Page* 267.

1684. *February* 8. JAMES CAITHNESS *against* COLONEL BORTHWICK.

MR James Caithness, writer, pursuing Colonel Borthwick, on a debt wherein he was bound with Scott of Ardross, and the Colonel adducing strong presumptions that this was paid with the debtor Ardross's means, and the bond retired with a blank assignation, which falling in Mr James's hands, he had fraudulently filled up his own name therein:

The Lords, on Harcous's report, *ex officio*, ordained any witnesses the Colonel should condescend on to be examined, what they know of the trust or manner of retiring that debt. For though, of old, it was a decantated maxim, that my written bond cannot be taken from me *nisi scripto vel juramento;* yet, where there is suspicion of contrivance or fraud, the Lords do, by witnesses, expiscate the truth; and secret conveyances would never be discovered if the Lords

took not this course; and seldom any loses a just cause by this method of procedure. *Vol. I. Page* 268.

1684. The Town of Burntisland *against* The Town of Kirkcaldy.

January 17.—The Burghs of Easter and Wester Kinghorn, *alias* Bruntisland, give in a libel to the Privy Council, against the Town of Kirkcaldy, craving to have them prohibited from keeping any ferry or passage boats between their Town and Leith, seeing it is no ways a secure port for taking in men and horses, nor are they furnished with so good boats as the pursuers; but the king's subjects are oft in hazard, and many times drowned; and that ferries are *juris publici* and *inter regalia;* and that Craig, *feud. lib.* 1, *dieg. ult.* reckons *angariæ seu parangariæ præstationes navium inter regalia;* and if the king had his militia forces to transport in haste, Kirkcaldy could not serve him, but only they; *et jus portûs non cuivis competit.*

Answered,—That Kirkcaldy is a burgh-royal, and by its situation lies on the sea, and so naturally accommodated to serve passengers; and the lieges are best judges of their own conveniences, and ought not to be restricted; and the more passages the better. And for goods and merchandise, if they be landed at Bruntisland or Kinghorn, no cart can well draw them up that steep path and brae near Kinghorn, for they dip so deep in the sand. And they have no other way to serve the east parts of Fife if Kirkcaldy were prohibited. And though the 20th Act of Parliament, 3d James III., and the other Acts relative, only name Kinghorn, and not Kirkcaldy, (this would also exclude Bruntisland, though it be also called Wester Kinghorn, and all the other sea towns there;) yet these acts do not contain a full enumeration of all our ferries; neither can it exclude others who have been in possession, near prescription, of boats not only for transporting and carrying goods, (which is common to all burghs,) but also of ferry-boats for passengers, (though they have not convenience yet for landing horses, but they are mending their harbour;) and that their charters from the king bear the right of a free port; and Bruntisland, at a conference or meeting, offered to allow them one or two boats.

The Privy Council, finding this a case merely civil, and depending on a declarator, referred them to the Session, as the Judge Ordinary for deciding such cases; but recommended it to be summarily discussed there. *Vide* 8th Feb. 1684. *Vol. I. Page* 261.

February 8.—The debate between Burntisland and Kirkcaldy anent the right of Ferry-boats, mentioned 17th January, was reported by Carse; and the Lords being unclear, they nominated the President, Blair, and Carse, to call both parties before them, and study to settle and accommodate the difference betwixt them. But they not having prevailed, the parties at last submitted to Sir John Cunningham: who by his decreet-arbitral restricted Kirkcaldy to four boats, and Dysart to two; Burntisland and Kinghorn having as many as they please. *Quær.* how far these two burghs may quarrel this decreet, it being only their Magistrates who submitted, who cannot alienate the Town's privileges. *Vol. I. Page* 268.

1684. *February* 12. BOYD of PINKILL *against* CATHCART of CARLETON.

BOYD of Pinkill having given in a complaint against Cathcart of Carleton, as having committed a riot in poinding his goods, after a bill of suspension was presented, and ordained to be discussed:—ANSWERED,—He was ordained to produce the bill, and yet keeped it up; and therefore the Lord Ordinary, before whom it was heard, ordained the execution to go on.

REPLIED,—That there should have either been a decreet or protestation, and so should have been put up in the minute book, to have given him fair warning and advertisement, before he could have proceeded.

The Lords, on Redford's report, found in such a case there was no formed process, and so needed not go to the minute-book: and thus found the execution legal and warrantable. *Vol. I. Page* 269.

1684. *February* 14. DAVID PEACOCK and ALEXANDER GORDON *against* The TOWN of EDINBURGH.

THE action pursued by David Peacock in Vidavia, and Alexander Gordon, bailie in Aberdeen, his assignee, against the Town of Edinburgh, being called *in præsentia*; ALLEGED,—This debt had all the qualifications requisite to a public debt, and so was discharged by the 26th Act Parl. 1681; for it was contracted in 1640, when General Ruthven keeped out the Castle against the covenanting Lords, for the King, and had a general warrant in the Acts 33 and 34 Parl. 1640, anent the Committees of Estates borrowing money for carrying on that cause; and that the Act of the Town Council of Edinburgh, which is the warrant of this bond, mentions that it was to help to levy 500 men. ANSWERED,—The Act of the Town Council, being the debtor's own deed, cannot annul his bond; and the very Act bears, that they got an assignation upon the contribution of the tenth penny and the excise, for their relief.

REPLIED,—The bond relates to the Act, and without an Act would be null; and so is just alike as if the Act had been engrossed in the body of the bond; and the registers of a Town unvitiated are probative both *pro* and *con*; and that assignation for relief was never effectual, the contribution being but a voluntary thing; and the Estates giving that assignation is a sufficient argument that they acknowledged this for a public debt, and so the Estates undertook it *animo se obligandi*; and the definition of an obligation agrees here, that it is *vinculum juris quo necessitate astringimur*, &c.

The Lords declined to decide this; and named some of their number to endeavour to settle the parties; and accordingly the Good Town got down 4000 merks of the whole claim, and gave security for 6000 merks; and the decreet went forth in these terms, for their warrant. *Vol. I. Page* 270.

1684. *February* 16. THOMAS RIGG and ERSKINE of ALVA *against* The EARL of ROXBURGH, &c.

MR Thomas Rigg, and Erskine of Alva, pursuing a forthcoming against the Earl of Roxburgh and his tutors; and Sir William Primrose being also creditor compearing, produced his interest to the clerk; notwithstanding whereof Mr Thomas got out his decreet, without respect to his interest.

The Lords, upon Redford's report, finding it was then in the clerk's hands, rescinded and recalled the said decreet. *Vol. I. Page* 271.

1683 *and* 1684. JEAN SCOT, Lady Snadon, *against* DAVID MOODIE.

1683. *November* 22.—AT the Privy Council, there are mutual libels between Jean Scot Lady Snadon, and David Moodie in Montrose; he complaining, that she reviled him as perjured, &c.; and she alleged, that he cruelly beat her. Both are admitted to probation; but Bailie Miln was casten from being a witness on the parity of the late Act of Parliament in 1681; that he had married the Lady's niece, though he was a common witness, cited and elected by them both. But David Moodie passed from him; in which case, I think he should at least bear his expenses.

Item, David was excused from being present, on a bill and testificate that he was indisposed; and also a commission was granted to Erskine of Dun, and Falconer of Glenfarquhar, to examine Bailie Turnbull at Montrose, because by certificate it was made appear he had fallen and broken his arm. *Vide* 3d January 1684. *Vol. I. Page* 244.

1684. *January* 3.—At Privy Council, the Lady Snadon's probation (mentioned *supra*, 22d November,) was advised, and the riot found proven; and Moodie fined in 300 merks, as an assythment to her. *Vide* more of this, 19th February 1684. *Vol. I. Page* 256.

1684. *February* 19.—Jean Scot, Lady Snadon, having given in a bill to the Lords, representing that David Moodie had beat her *pendente lite*, (*vide* 3d January 1684;) and so ought to lose the cause, conform to the 138th Act 1584, and 219th Act 1594:—OBJECTED for David,—1*mo*, That there was but one neutral indifferent witness who proved the beating; the other two were married on her nieces. 2*do*, That, at the time of the alleged beating, there was a standing submission in write betwixt them, and so there was no *lis pendens*. 3*tio*, *Duæ actiones pœnales non debent concurrere circa idem subjectum.* But so it is, he was fined for this blow already, and ought not also to be punished in the loss of his civil action beside. To the 1*st*, it was ANSWERED,—They were witnesses also elected by Moody, and so cannot be objected against by him; as Mascardus shows, vol. 3. *de Probat. conclus.* 1242. To the *second*, A submission does not extinguish, but only supersedes the depending process; else one, after the expiring of a submission, could not insist in the former process, but behoved to raise a new one; and here the submission was given over and deserted before his beating, and so the process reconvalesced. To the

third, They do not concur, unless there be a special statute for it, as here; and Tolquhon, at Mr John Strachan the minister's instance, was fined both at Privy Council, and in the loss of his depending cause; (*vide* 22d February 1683;) and the fine at Privy Council is not penal, but only the *vindicta publica*, and the assythment and reparation of the party's damage.

Yet the Lords waved all thir points, and refused the desire of her bill; because the decreet of Secret Council produced by her *in modum probationis* did not bear that her libel anent his beating her was proven; but it was so scrimply worded that the Lords only found him guilty of a wrong done to her, in general words.

Then she offered to prove, by the probation led at Privy Council, that he beat her; and if the Session found it defective, she offered yet to supply it. Upon this, she gave in a bill to the Council, on the 21st February 1684, craving they might explain their decreet, and declare that David Moody was fined for beating her; or else authorise their clerks to transmit the probation to the Lords of Session, that they might peruse the same, and so find it proven, in order to their declaring and applying the Acts of Parliament to David, and that he had lost the cause. The Privy Council would not grant the desire of this bill.

Then, upon the 27th February, the Lords, upon a bill given in by the Lady Snadon, allowed her a diligence against the clerks of the Privy Council to give up and transmit the probation there led anent Moody's beating her; as also to adduce farther witnesses for proving it, if she pleases.

The Clerks of Privy Council were displeased that the Session should have granted diligence against them,—a Court equally sovereign with themselves.

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1684. *February* 20. ALEXANDER DUNBAR *against* ADIE and LIVINGSTON.

ALEXANDER Dunbar's pursuit against Adie and Livingston, merchants in Aberdeen, being reported by Saline, the Lords decerned them to pay the price of the 500 bolls of meal sold to them by Mr Cuthbert, seeing it appeared that Dunbar was his partner in the bargain, and had an assignation from him to the whole, and a consent from his son's tutors of law to uplift it. But, because it was confessed that the assignation was on death-bed, of an heritable bond secluding executors, and that there was this informality in the tutor's service, That he was not 25 years old, conform to the qualification required by the 21st Act 1474; therefore the Lords ordained Mr Dunbar to find sufficient caution, before he uplifted the money, to secure the suspenders against Cuthbert's heirs, or any reduction that might be raised of the assignation he gave *in lecto* to Mr Dunbar.

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1684. *February* 20. Sir Robert Sinclair of Stevenston *against* Hary Sinclair.

Sir Robert Sinclair of Stevenston against Hary Sinclair, reported by Saline. The Lords found Harie's acquisition of Veatch of Dawick's apprising of the lands of Carfrae was but in trust, and in contemplation of a bargain Hary intended of these lands; and therefore that he could not seek the full of the comprising from Sir Robert, (though he had now sold the lands to Sir James Hay of Linplum; but it was after Hary had refused them;) but only what he gave for it himself. *Vol. I. Page 273.*

1684. *February* 22. Ranking of The Creditors of Lord Argyle.

The Lords, as Commissioners of my Lord Argyle's forfeiture, for ranking the Creditors, met this afternoon; and Lundy, Treasurer-depute, as donatar to Hamilton of Monkland's forfeiture, having right to 10,000 merks owing by bond to Monkland, by Argyle; and having procured a letter of recommendation from the King; the Lords were much puzzled, for they had the haill creditors to rank again, and to adjust and cast up their proportions, to make room for taking him into the first class of the creditors; and they gave him Sir Colin Campbell of Arbuchle's locality. *Vol. I. Page 273.*

1684. *February* 22. Macdougall's Wife *against* Her Husband.

One Macdougall, a Highlander, is pursued by his wife, before the Commissaries of Edinburgh, for divorce *ex capite impotentiæ*. And she having offered to prove, by inspection of chirurgeons, that he has nothing wherewith; he declined a visitation, as immodest, and absents himself. *Quid juris?* shall he be holden as confessed? *Nuda inspectio corporum* is condemned by Justinian, *ad princip. tit. Instit. Quib. mod. tutel. finit.*

The old way of trial was, by a silk cord down their belly, if it got free passage down, or not. *Vol. I. Page 274.*

1684. *February* 22.

One being to pursue a Scotsman living at Dantzick, on a registrate bond, he gives in a bill, representing, that the judges there did not regard his registrate extract under the clerk-register's hand; and therefore craves the Lords would ordain his principal bond to be delivered up to him, upon his returning all the extracts. The clerk-register argued much against this; seeing they could not

know how many extracts were given out, and boys might neglect to write on the back if it was the 2d or 3d extract.

Yet, by a famous Act of Sederunt in Latin, dated the last of July 1596, recorded 17th November 1599, there is a recommendation to foreign judicatories, that these extracts may be probative and authentic abroad, as they would have their notorial instruments or judicial Acts regarded by us. Only, I think those extracts which go abroad should not singly bear the Register's name, but also a large attest, with all his titles, and the seal of the College of Justice.

See *Seton of Barns's* case against his *Sister*, 14*th March* 1682.
Vol. I. Page 274.

1684. *February* 28. The TRADES of EDINBURGH *against* The MERCHANTS.

HARCUS reported the declarator raised by the Trades of Edinburgh and their deacons against the Merchants, founded on King James VI. his decreet-arbitral, and a late Act of the Town Council of Edinburgh, in October last, That the crafts shall get out three of the six given in by them in list to be deacons; and the Lords declared in favours of the said act, and that it should not be lawful to the Merchant Council to give them out any but three of their own six.

The Trades ALLEGED,—This privilege was given them for quitting their right, at the time of the decreet-arbitral, that one of the four bailies should be a tradesman; and that the purer times near to the said decreet, (which was the best interpreter of it,) inviolably observed it; till of late, faction prevailing, Sir James Stewart, provost, began to give them out other three than any of their six; and then commonly they pitched on the poorest and most unworthy of the trade to be their led horses in their votes.

Yet the decreet-arbitral runs only, that the Magistrates shall ask the advice of the deacons of trades, who is the fittest to succeed them; but does not limit them to a number of six, more or fewer, (which custom hath since stated in six;) *et consilium non est obligatorium.*

Some of the Lords were for referring the case to his Majesty, to explain his grandfather's decreet-arbitral in 1583, (which is unclear in many things,) as being a point of government. Others, That trial and probation should have been led, what has been the uniform practice these forty years bygone: in which case, the Trades would have lost it. However, it carried but by one vote; and Carse was *non liquet.*

Though the Trades, while Trades, cannot now be Magistrates, yet this declarator does now give them a great influence in electing them, and may be the seed of much animosity between the two; for, by the Act, the Merchants may even yet pretend the six offered in list are not of the most worthy, as it is required they be.

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1684. *February* 29. JAMES FALCONER *against* The SECRETARIES of the MINT.

MR James Falconer, advocate, gave in a bill, complaining that, upon the decreet of the Mint obtained against him, and the King's modification of his fine, (gifted to the two Secretaries, with Sir John Falconer's fine,) they had denounced him to the horn, though he had an intimated bill of suspension prior to the same; and so craving the denunciation might be recalled and annulled.

The Lords would not do this, (though the denouncing was a riot,) but only discharged the registrating of the horning till the bill were discussed; or, if it was registrate, then they discharged the booking it. *Vol. I. Page 277.*

1684. *March* 1. WILLIAM LIVINGSTON *against* BETTY WHITEFORD.

THERE is a letter from the King, procured by Mr William Livingston, brother to the Viscount of Kilsyth, to the Lords of Session, desiring them to forbear the deciding of that advocation raised by him against Mrs Betty Whiteford, daughter to umquhile Sir John Whiteford of Milntown, from the Commissaries of Edinburgh, of a process of adherence; and for declaring that he had owned her for his lawful wife, (for she had borne him a child,) and to lay it over till the 1st November; in regard he was at London sick and unable to attend it: and the King had caused his own physicians visit him, and they had attested and declared that he could not travel at this season, without hazard of his life: so it was no simulated sickness. Yet some can procure a fever to themselves for an hour or two.

This letter being intimated to her advocates, they objected that this was a private writing, not to be regarded by the 92d Act of Parliament 1579 and the 47th Act 1587; and was *mali exempli*, to stop justice, especially against her who was seeking to have the stain lying on her honour cleared, by proving that he owned her as his wife when she was in child-bed. Some did contend, that, by the 18th Act of Parl. 1681, anent the King's cumulative jurisdiction, he might stop any process depending before the Lords. But that was not meant by the Parliament, at the making of that Act. *Vol. I. Page 277.*

1684. *March* 6. ROBERT LAUDER *against* JOHN PENMAN.

MR Robert Lauder, one of the clerks of Exchequer, being creditor by bond to John Penman, merchant in Edinburgh, in 1000 merks; and the said John breaking suddenly, and giving a fraudulent disposition of all to his wife and

brother; Mr Robert gave in a bill to the Lords, representing this conveyance, and that he had charged and arrested; and therefore craved sequestration of the goods.

The Lords ordained a padlock to be put on his shop, and his household-furniture to be inventaried, and his writs sealed, to be made furthcoming to all parties having interest: seeing he was *in meditatione fugæ* when he made the said right; and so it may be quarrelled on the Act of Parliament 1621, anent deeds of bankrupts.

Quæritur if this sequestration would hinder a lawful creditor to poind.

Then Mr Lauder, on a bill to the Lords, got a deliverance, on the 29th of March, ordering him to cause inventary the goods in the shop, and to roup them to the best avail, and to take off the padlocks off the shop-door, that the landlord may set it at Pasch to some other tenant; and allowed Mr Robert Lauder, as now donatar constituted to his escheat, to sell and intromit *medio tempore*, lest they perish, or the ware turn unfashionable. *Vol. I. Page 278.*

1684. The KING'S ADVOCATE *against* The CREDITORS of the EARL of ARGYLE.

January 29.—THE King's Advocate upon a bill gets his cause against the Creditors of the Earl of Argyle called summarily; against whom he alleged, That his Majesty's gift of forfeiture, in favours of his creditors, did not extend to the properties of those vassals of Argyle which fell in the King's hands through their not being confirmed before his forfeiture; seeing these vassals' estates were no part of Argyle's fortune at the time of his forfeiture; and it was the King's design to dispone and convey no more to Argyle's creditors than what was his, the time of his forfeiture; and therefore, that the vassals' estate still remained with the King, and he was not denuded thereof; nor had the creditors any *jus quæsitum* thereto. And that the creditors could not say that it was upon the faith or in contemplation of these vassals' estates that they lent Argyle their money; and so they lose nothing of what they then relied on for their payment.

It was ANSWERED, for some of the creditors, (for they were not cited in the ordinary way, but only at the market-cross of Edinburgh generally,)—That they opponed the King's signature and charter under the Great Seal, whereby the King had disponed, to them and others, all the benefit that had accresced and befallen to him through the Earl's forfeiture. But, *ita est*, under that generality the unconfirmed vassals' estates and properties will also fall to them.

The King's Advocate enlarged on the King's *jus supereminentis dominii* over the goods and possessions of his subjects, where the public good was concerned, from Grot. *lib.* 1, *de Jur. Bell. et Pac.* But see Zeiglerus in his animadversions upon him, who calls this *eminens dominium, figmentum Grotianum.* This was continued to a farther hearing. *Vide* 5th March 1684. *Vol. I. Page 265.*

March 5.—There is a letter from the King, anent the Earl of Argyle's vassals, mentioned 29th January 1684. The King, by this letter, declares, it was

not his meaning that the vassals should fall under his gift in favours of the creditors; for the vassals, by the very clauses of warrandice contained in their charters from the family of Argyle, were creditors as well as the rest were. Yet this does not determine whether the unconfirmed vassals' properties shall fall under the forfeiture or not; for these, it may be, are reserved to be the foundation of a new donation from the King in favours of some statesmen: so that it was not fully agreed whether this letter meant a favour to the vassals or not.

Vol. I. Page 279.

1684. *March 5.* AITKIN, BISHOP of GALLOWAY, *against* DUMBAR of GRANGE.

AT the Commission for Plantation of Kirks, Aitkin, late bishop of Murray, now of Galloway, reducing a valuation of some teinds belonging to Dumbar of Grange: and it being alleged that the said decreet of valuation was null, because nothing had followed upon it by the space of forty years, and it was preseribed, because it had never been during all that time extracted:

It was ANSWERED,—That a minute of a decreet was as well a decreet as if it were extracted, and the signatures were warrant enough for it. And the Clerk-Register declared he would require no more but to find minutes in the Register; which was warrant sufficient for him to extend them.

The Lords found Grange ought to have the extract of the said decreet, reserving to the Bishop all his other reasons of reduction as accords of the law.

Vol. I. Page 279.

1684. *March* 6. SECRETARIES MURRAY and MIDDLETON *against* HOPE of GRANTOUN and ANDREW CRAWFURD.

THE two Secretaries of State, Murray and Middleton, pursue Hope of Grantoun, as tutor to Hopeton, and Andrew Crawfurd, Sheriff-clerk of Lithgow, for declaring his right to the said sheriff-clerkship null, because it flowed not from the Secretaries of State, who have the power through all Scotland of placing the Sheriff-clerks. He defended on two gifts; one from Hopeton, who, being an heritable Sheriff, had power to place his own clerk, as all other heritable Sheriffs have. The *second* was a deputation from the King, when the last Hopeton's sheriff-ship was declared void, through his not taking the test, in November 1681.

ALLEGED,—None of thir were sufficient to maintain against the Secretaries, who, *quoad* this casualty and perquisite of their office, were founded *in jure communi* and a general custom and possession.

This debate being advised on the 11th of March,—The Lords sustained Andrew Crawfurd's gift, wherein he was conjoined with Mr Andrew Ker; and found these conjunctions to the longest liver lawful; though thereby the succeeding Secretaries are forestalled and deprived of a casualty, which may be thereby hindered from falling and existing in their time. But thir conjunct

gifts were sustained before, *29th June* 1677, *Archbishop of Glasgow* against *The Commissary Clerk of Peebles.* *Vol. I. Page* 279.

1684. *March* 6. JAMES REID *against* JOHN REID.

JAMES Reid, merchant in Edinburgh, against John Reid, skipper in Leith, is debated, and decided, anent the setting of a ship, and reducing a decreet of the Admiral's. The Lords found, though the set expressed no more but only James Reid and the skipper; yet it behoved to be interpreted not only for the skipper's four parts of the ship, but also for the parts belonging to the other owners, who were called as defenders and joined with the skipper; and so decerned against James for the price of eight sixteen-parts. But, in regard the skipper had not yet, upon oath, given in an inventary of the ship's whole furniture and tackling, they ordained him to depone thereanent: though James was at a great loss by the eleven months' delay, and plea; so that the ship was turned unserviceable; *et res non erat amplius integra.* *Vol. I. Page* 279.

1684. *March* 6. SIBILLA ARNOT *against* ROBERT YEAMAN.

SIBILLA Arnot having given in a bill against Robert Yeaman, portioner of the Nungate of Haddington, bearing that she, as heir served to her goodsire, had an improbation depending of his rights of some lands which his father had acquired from her goodsire; and, *medio tempore*, craved some modification and aliment from him, his rights being only redeemable, and he being more than paid by his possession and intromission:

The Lords refused the desire of this bill. Yet they had granted the like to Maxwells against Carlisle, *supra*, at the 17th of January 1683.

Vol. I. Page 279.

1682, 1683, *and* 1684. JAMES DALMAHOY, &c. Tacksmen of Excise, *against* WILLIAM CLEGHORN, THOMAS BORELAND, &c. Brewers.

1682. *March* 28.—MR James Dalmahoy, and the other tacksmen of the Excise of Edinburgh, against Bailie Thomas Boreland at the West-port, and some other brewers. The Lords, on Redfoord's report, found the letters orderly proceeded against the brewers,—Dalmahoy and the other chargers finding caution to refund whatever George Miln's brewing should be found to extend to, more than the survey which the tacksmen gave up, upon Sir John Nicholson's decreet-arbitral. *Vide infra*, 17th March 1683. *Vol. I. Page* 181.

1683. *March* 17.—Mr James Dalmahoy and the other tacksmen against William Cleghorn and the Brewers. The Lords, contrary to what they did 28th March 1682, do now allow the Tacksmen to prove, by witnesses, that, before the assignation they made of the tack to thir defenders, they had consented

to a reference anent Brown of Gorgiemiln's brewing, to Sir John Nicolson, and what excise he should pay for the same; and, that being proven, they found it sufficient to liberate them from the contravention of the warrandice of their assignation.

The words of the interlocutor are:—The Lords find it relevant to liberate the chargers from the deduction of the value of Gorgiemiln's brewing, that there was a reference anent Gorgiemiln's brewing, prior to the bargain betwixt the chargers and suspenders, and prior to the 4th of October 1671; and find the same probable by witnesses, and assign to the chargers' procurators to prove the same. *Vol. I. Page 227.*

1684. *February* 6.—William Cleghorn, brewer, his bill against Mr James Dalmahoy, and the other Tacksmen, being with the answers read and considered by the Lords; they ordained the Act to be extracted in terms of the last interlocutor; (*vide* 17th March 1683;) and allow the petitioner to raise reduction against Brown of Gorgiemiln, of his agreement and survey of brewing; and appoint him to answer summarily *et incidenter*, in this process, before my Lord Harcous, upon this head, that the decreet-arbitral is unjust and reducible as being *contra arbitrium boni viri*; and ordain Archibald Young to depone if he refused to subscribe the reference, and what was the cause of his refusing; reserving to themselves to consider what his oath shall operate. *Vide* 11th March 1684. *Vol. I. Page 267.*

1684. *March* 11.—The debate between William Cleghorn, brewer, and the other assignees of the tacksmen of the Excise, against John Brown of Gorgiemiln, (anent which *vide* 6th February 1684,) is reported by Harcus; and the Lords, before answer, ordain the survey-rolls to be produced, that they may see if thir pursuers and other tacksmen had as great an ease in the valuing their weekly brewing as Gorgiemiln has by Sir John Nicolson's decreet-arbitral, appointing him only to pay the excise of four bolls weekly, whereas he truly brewed upwards of 30 bolls; which is *læsio realis* almost *ultra decuplum*. For the Lords thought, if Cleghorn and the rest of them had as great an ease (as Gorgiemiln) effeiring to their brewing, it is unjust in them to quarrel Gorgiemiln's low valuation, seeing he was to have had an interest in the tack as well as they. But they also referred it to three of their number to settle the parties, if they could. *Vol. I. Page 280.*

1684. *March* 12. Castles *against* ———.

In the case of one Castles against , reported by Pitmedden, The Lords found the intimation of an assignation at a man's dwelling-house, when he was out of the country, null; and that the legal and formal method in such a case was to take forth letters of supplement from the Lords, on a common bill, and to execute the intimation at the market-cross of Edinburgh, pier and shore of Leith.

And yet if he have a family, an intimation at his house may sooner come to his knowledge than that other. *Vol. I. Page 281.*

1684. *March* 18. SIR WILLIAM SHARP of STONYHILL *against* STRACHAN of GLENKINDY.

THE case was, Glenkindy being pursued criminally for a murder, the King's advocate then caused the Lords of Justiciary take a bond from him to produce the witnesses against himself, whom he alleged Glenkindy had abstracted, under the pain of 20,000 merks; and he having incurred the failyie by not producing them when called for, the Exchequer, when they cleared counts with Sir William Sharp as cash-keeper, gave him an assignation to this bond in part of payment of his balance. Glenkindy raises a reduction of it *ex capite vis et metus*, being forced to it by the Criminal Judges; he not being obliged to furnish probation against himself.

The Lords repelled the reasons of reduction, and found the Justices supreme in these cases; and that they could not judge on their iniquity.

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1684. *March* 21. The EARL of FORFAR *against* The MARQUIS of DOUGLAS.

THE Earl of Forfar and the Marquis of Douglas their actions were advised, anent reducing the transactions and agreements made between them in their minorities, though *in præsentiâ amicorum seu propinquorum, ubi nemo præsumitur deceptus*; and anent the Marquis's quarrelling the exorbitant provision of 10,000 merks *per annum* of free rent, given by the Earl of Angus, their father, in favours of Forfar, his son of the second marriage, contrary to an express restriction, prohibition, and interdiction (only it is not effectually conceived in the terms of an irritant and resolutive clause of amitting the fee in case of contravention, but only *nudum preceptum de non alienando*,) laid upon the said Earl, in his first contract of marriage with the Duke of Lenox's sister, this Marquis's mother, (wherein King Charles I. is a party contractor and subscriber;) by which Angus's fee was qualified and made a *feudum conditionatum*; though it was alleged he was *dominus*, and such a naked prohibition could not hinder him to provide the children of a second wife, of an honourable family, *viz.* of Weyms, and who brought a good tocher, with a rational competency.

It was ALLEGED against the Earl,—That he could not revoke the contract; because, being then 18 years old, he had bound himself upon his fidelity and honour not to quarrel it; and in England the Peers have no other oath but upon their honour; and *medius fidius* was an old Roman oath; and Bockelman, *ad tit. D. de Jurejur.* affirms, That noblemen's promises on fidelity and honour are equivalent to an oath; and if Forfar had confirmed the contract by an oath, he could not have been reponed, *per Authentic. Sacramenta puberum.*

Stio, ALLEGED,—That the lands of Bothwell and Wandell, given in satisfaction, were worth 10,000 merks *per annum*, in so far as though they did not pay that yearly rent, yet, in buying and selling, they were worth that much; because near the half of it was feu-duties and superiorities, which, in common estimate, are valued to 24 or 30 years' purchase; being both more noble and certain than any other rent.

The Lords recommend to the Chancellor, High Treasurer, and some others, to endeavour the settling between the two brethren. *Vol. I. Page* 284.

1684. *March* 21. ANDREW DICK *against* CRAIGIE of GAIRSEY.

IN Captain Andrew Dick's action against Craigie of Gairsey in Orkney;—the Lords, on Harcus's report, found the discharge produced by Gairsey, though it only mentioned for rests of some of his lands, and not of the whole, imported a full exoneration of all his feu-duties preceding 1655, for his scait and udal lands. *Vol. I. Page* 284.

I find much of their feu-duties consists in meal and butter: but the steward, or his chamberlain at his girnell, converts them into a price in money.

1684. *March* 21. JOHN IRVINE *against* BROWN of CARSLUITH.

HARCUS reported the debate between John Irvine in Dumfries, and Brown of Carsluith;—and the Lords found a back-bond granted by Maxwell of Coull, Irvine's cedent, not being precisely correspective nor relative to the bond charged on, though of one date, did not meet Irvine, who was an assignee, unless it were without an onerous cause, or for the cedent's behoof, or that the back-bond founded on had expressly related to the bond charged on, and the one had been made the cause of the other; which was *Hector Mackenzy's* case in 1676, and *Arthur Forbes's with the Master of Salton*, in *November* 1678. *Vol. I. Page* 284.

1684. *March* 25. LORD MORDINGTON'S CREDITORS.

BY an order of the Lords to Harcus, the lands of Nether-Mordington, belonging to Douglas, Lord Mordington, are rouped, on the late Act of Parliament 1681, anent the sale of bankrupts' lands, upon citation of the creditors; and Lieutenant Joseph Douglas buys them at 17 years' purchase, and seeks no other warrandice from the creditors but effeirand to the sum they get from him. Provost Curry, a creditor, opposed this all he could; but Charles Oliphant, the under-clerk, another creditor, carried it on. *Vide supra*, the roups of *Bogie and Cunnochie*, by order of the Lords of Session, though before that Act of Parliament. *Vol. I. Page* 285.

1684. The EARL of ABERDEEN, Chancellor, *against* SIR ALEXANDER FORBES.

February 27.—THE Earl of Aberdeen, Chancellor, and Sir Alexander Forbes of Tolquhon their case was decided, anent *viæ regiæ, vicinales, publicæ, et privatæ.*

The Lords having heard the bill and answers, they sustain Tolquhon the defender's allegeance in these terms, that the defender offers to prove, the way controverted is the high-way directly leading from a burgh-royal, *viz.* Banff, to a burgh-royal, *viz.* to Aberdeen, or from Banff to a sea-port directly, and so is the king's high-way: and adhere to the Act as to the other points, allowing to prove that he had prescribed a way for peats, by forty years' possession before interruption; and refused to grant a commission or visitation; but prorogate the diet of reporting the diligence to the 25th March next.

For high-ways consider the 53d Act Parl. 1555; 156th Act 1592; 38th Act 1661, article, *Of the High Ways*; and 16th Act 1669; Mascard. *de Probat. voce, Via;* Bart. Cæpolla, *de Servitut. tractat.* 2, *cap.* 3; and Stair's Institut. tit. 17, *Of Servitudes.*

It was ALLEGED for the Chancellor,—In thir cases there was only *tantum præscriptum quantum possessum*, and no more; so that his use and custom of carrying lime that way ought not to give him right to carry peats, (unless he had carried also peats that road forty years,) these being *diversa*; and it being odious to burden another man's lands with servitudes of high-ways; yet the carrying the one is no more prejudicial than the other. See Craig, *feud. lib.* 1. *dieges. ult. de Regalibus.* And, by this interlocutor, no way ought to be reputed a king's high-way, unless both the *terminus a quo et ad quem* be public; whereas lawyers think it enough though it begin *in agro privato, si exitum habet ad viam publicam, vel urbem, vel portum, vel flumen navigabile*, or to a kirk, or to a moss. The Chancellor would make Tolquhon to have right only to a foot-way, or an *actus* at most, for a horseman, but not to be a *via* for carts or wains, or droves of cattle. *Vide* 26th March 1684. *Vol. I. Page 274.*

March 26.—The Chancellor's action against Sir Alexander Forbes, mentioned 27th February 1684, is called; and though Tolquhon had a diligence running, and the circumduction for not producing it was only conditional till the 22d of March, before which he produced it, and craved a second diligence; yet the Lords rejected it, and advised the probation led by the Chancellor; and declared his lands free *(nam unumquodque prædium præsumitur liberum nisi servitus probatur,)* of any high-ways for leading of peats; and found Tolquhon had not proven his right of servitude; and therefore assoilyied my Lord Chancellor and his lands. *Vol. I. Page 285.*

1684. *March 27.* The EARL of WINTON *against* PATRICK CUNNINGHAM.

THE Earl of Winton gave in a bill, craving Mr Patrick Cunningham, agent, might be examined on the declarator of trust of a tack of prorogation of George Young's teinds in Winchburgh, in respect he was on death-bed.

The Lords recommended to my Lord Edmonston to go to his house, and take this oath; but he died before his examination.

Winton, by another bill, craved one Robert Seton, in Tranent, to be examined upon the tenor of a lost bond, whereon there was an action depending, to the effect it might lie *in retentis, ad futuram rei memoriam.*

The Lords likewise granted the desire of this petition; and appointed —— to take his oath of knowledge in relation to that bond, in the vacance.

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1684. *March* 29. THOMAS ROBERTSON *against* WILLIAM LAMB and WILLIAM GILCHRIST.

THE case of Thomas Robertson, with William Lamb and William Gilchrist, merchants in Edinburgh, was advised summarily; (both parties having consented to the summary discussing thereof;) and the Lords found, by the depositions of the customers, waiters, and porters, that the 2000 deals in controversy were not confiscated by any fault of Thomas Robertson, but through the Norway skipper's short report of 7000 deals only, and concealing this 2000; (this differs from a short entry;) and therefore found Thomas liable only in the price of the 7000 deals: though he bought the whole cargo, yet the confiscation not arising from any fault in him, it could not be upon his peril: and therefore assoilyied him from the rest. *Vol. I. Page 285.*

1684. GRAHAM of CLAVERHOUSE *against* The EARL of LAUDERDALE.

January 24.—COLONEL Graham of Claverhouse insisting against the Earl of Lauderdale, upon the king's letter, to dispone to him the house, yards, and parks of Dudhope, with the constabulary of Dundee, he paying 20 years' purchase for it to the Chancellor,—to which 20 years' purchase, Lauderdale, on his transaction with the Chancellor, was assigned:—It was ALLEGED,—*Esto* this were the king's cause, yet, not being called within 48 hours after the returning of the process, he behoved to have 15 days' advertisement, conform to the 16th Act of Parliament 1672, ratifying the regulations: which he had not got.

The Lords repelled this, in regard the king's letter mentioned *supra*, 13th December 1683, recommending to them to agree, was a *medium impedimentum*; and there was but 48 hours between the upgiving of the tryste and the calling, which satisfies the Act of Parliament.

Then ALLEGED,—The sum of £4000 sterling of the Mint-decreet being gifted to Claverhouse, the king was denuded, and it came to be in the case of a common donatar; who had not the privilege of a summary calling, but behoved to abide the course of the roll.

The Lords find the letter made it still as if it were in the case of one of the king's own causes.

After repelling thir dilators, then Claverhouse insisted that Lord Lauderdale might either purge all the incumbrances that affected the house and yards, or else give him real warrandice out of his other estate.

The Lords delayed to answer to this, seeing the offer of absolute warrandice may satisfy; for, by an inhibition served upon it, it may be made more effectual than real warrandice, which is restricted to a particular subject, out of which it

is given; whereas an inhibition stops the disposing upon any lands within those shires where it is served and executed. *Vide* 31st January current.

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January 31.—Claverhouse's cause against the Earl of Lauderdale, mentioned 24th January current, was heard in presence; and Lauderdale offering him a disposition of the house, yards, and parks of Dudhope, and constabulary of Dundee, in terms of the king's letter gifting the same to Claverhouse, at the rate of 20 years' purchase, to be paid by him to the Chancellor, which right the Chancellor had assigned in August last to Sir John Maitland, when he agreed with Lauderdale:—It was ALLEGED,—1*mo*, That the Chancellor had not right to the 20 years' purchase. Against which the king's letter was opponed. 2*do*, That he behoved to disburden it of all incumbrances. 3*tio*, He must renounce his relief against Sir John Falconer and his cautioners, *viz.* Southesk and Glenfarquhar, the President's father, conform to the king's letter.

The reason Claverhouse gave why he was not bound to pay 20 years' purchase, was, that it was expressly communed between the Chancellor and him, that he should have it *gratis* without any payment, (which the Chancellor denying on the bench, Clavers replied with some heat;) and that the king gave him freely out of the fine of the Mint-decreet £4000 sterling, or else the house, yards, parks, &c. of Dudhope; and if he pay 20 years' purchase for them, he gets no donative at all, but pays the full worth and more.

The Lords, the next day, having advised this cause, found Claverhouse bound, by the king's letter, to pay twenty years' purchase for all within the parks, and reserved out of that which is appointed to be disponed to the Chancellor: and, for liquidating thereof, granted commission to value the lands, and to report what they are worth, at twenty years' purchase. And find the disposition offered not sufficient, as wanting the Lady Maitland's consent, and that it ought not to relate to the twenty years' purchase: and therefore ordained Lauderdale, against the same day, to have a disposition ready of these lands and parts, with real warrandice out of his other estate, to be given up to Claverhouse, upon payment of what shall be determined to be the twenty years' purchase; with this clause farther,—That, in case of eviction of these lands, Lauderdale shall be bound by the said real warrandice, to the value of £4000 sterling, which was gifted to Claverhouse out of his fine; but the said lands, worth £4000 sterling, only to be affected *quoad valorem* of the lands disponed. Which was most iniquous and inadequate, like a *pretium affectionis*; for the lands to be disponed are not worth the fourth part of that sum, and this real warrandice will be a mean to obstruct the sale of the lands to be thus given in warrandice.

Lauderdale had another defence, That, *simul et semel* with his giving this disposition, the king's letter appointed him to get his free remission for any malversation whatsoever he could be charged with.

This action being called again on the 6th of February, the Lords found my Lord Maitland subscribing the disposition, and his Lady's renouncing, sufficient to secure Claverhouse against her liferent; and that —— Scot of Rossie's consenting to the said disposition was sufficient to purge his warrandice he had thereon for the lands of Craig; and found no inhibitions could affect the house, parks, and constabulary of Dundee, but only those that were served at the market-cross of Forfar, as the head burgh of the shire of Angus, wherein the

lands lie. And, as to the incumbrance condescended upon by Claverhouse, of the reduction depending against Lauderdale at the instance of the Earl of Dundee's creditors for reducing his decreet of recognition, the Lords appointed the Lord Pitmedden, before whom the same is depending, to discuss it summarily before the report come back of the value of the lands: and, in case the creditors do not insist, ordain Lauderdale to give him real warrandice against the inhibitions served upon the dependance. *Vide* 28th February 1684.

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February 28.—Claverhouse's cause against the Earl of Lauderdale, mentioned 31st January 1684, was called; and the Lords found they might advise it summarily without enrolling, it being a part of the king's cause; and that they cannot oblige Sir John Maitland to consent to his father's disposition to Claverhouse; but ordain the clerk to mark on the process that he was cited. And find, by the probation, that the twenty years' purchase of Dudhope, &c. comes to £6000 Scots; and, on his paying thereof, ordain the disposition to be delivered up to him before the 20th of March; betwixt and which time Lauderdale may obtain my Lord Maitland and his Lady's consent; otherwise ordain the decreet to be extracted. *Vide* 29th March 1684.

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March 29.—The King's remission to the Earl of Lauderdale, and his son, came down; but a letter clogged it with two qualities:—1*mo*, That he should perfect his disposition to Claverhouse, (*vide* 28th February 1684;) 2*do*, That he should discharge his recourse of relief against Sir John Falconer, and the other officers of the Mint: and bore peremptorily that thir should be performed within eight days after sight; and if they were delayed, (which his Majesty would not believe,) then the remission not to be past the seals.

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1683 *and* 1684. JOHN STRACHAN *against* SIR ALEXANDER FORBES of TOLQUHON.

1683. *February* 22.—MR John Strachan, minister, and Sir Alexander Forbes of Tolquhon's cause being reported by Kemnay, the Lords found Sir Alexander Forbes had lost the cause, in regard, *pendente lite*, he had beat the pursuer. Though it was alleged the beating arose on another quarrel, and not upon this process; he having only forced him to obey a caption against him, by helping him on horseback: and that he had already paid 10,000 merks of fine imposed upon him by the Privy Council for that same fault, whereof the said minister had gotten 500 merks for his expenses; *et pœnæ non debent acerbe bis exigi*: and that the libel was for vicarage teinds, which in whole were not worth 1000 merks; yet he had libelled 9000 merks.

The Lords repelled all this, and decerned for the whole. *Vol. I. Page* 222.

1684. *March* 29.—MR John Strachan, minister, his cause, against Tolquhon, mentioned 22d February 1683, was brought in summarily, and advised: and the Lords found he had lost the plea, because he had beat him *pendente lite*.

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1684. JAMES WEIR of KIRKFIELD *against* PATRICK MITCHELL.

February 8.—PATRICK Mitchel in Preston having raised brieves to serve himself heir to —— Mitchell his cousin-german, before the bailies of the Canongate, and having led probation on his consanguinity before the inquest; James Weir of Kirkfield, servant to the high-treasurer, having got the gift of the defunct's *ultimus hæres* and bastardy, raises an advocation; and though there were no documents of bastardy, but great evidences of his legitimacy and his contingency of blood, yet it was advocated to the macers, and Saline appointed to be their assessor. *Vide* 10th April 1684. *Vol. I. Page 268.*

April 10.—Patrick Mitchell's service (mentioned 8th February 1684,) being ordained to be led before the macers, and Saline adjoined as their assessor, and this day being set; Weir of Kirkfield, donatar to the defunct's bastardy, stopped it on a bill, pretending that if he had got an incident to cite witnesses on the bastardy, and to prove the inhability and poverty of Mitchell's witnesses, he would make it appear that this party had no blood interest at all, and that the defunct frequently declared he was nothing to him.

On this, they continued the service for two weeks, and granted the donatar a diligence; but at last the service was got expede on a probation of his propinquity. *Vol. I. Page 295.*

1684. *April* 17. HUGH WALLACE *against* HUGH CAMPBELL and HUGH ARCHIBALD.

HUGH Wallace, servitor to Sir William Wallace of Craigie, pursues Hugh Campbell, Cesnock's son, and Mr Hugh Archibald, agent, for calumny and defamation of him, in alleging he had tampered to corrupt and seduce the witnesses against Cesnock. The defence, by way of reconvention, was, *first*, That the condescending on him in the criminal court as the practiser of the witnesses was necessary, being forced thereto by the Justice-General, who repelled the objections of subornation otherwise proponed in general. *2dly*, They had probable grounds to think he had been over active; for some of Cesnock's witnesses deponed that he had drunk with them, and given one of them a little money, and pumped what they could say against Cesnock; and *quævis probabilis causa excusat a calumnia.*

The Lords found both the libel and reconvention relevant; and admitted both to probation. *Vol. I. Page 295.*

1683 *and* 1684. JOHN HAY of MUIRIE *against* BALLEGERNO, POURIE, and OTHER CREDITORS of the last LAIRD of MUIRIE.

See the prior parts of this case, *supra*, page 417.

1683. *March* 13.—SIR John Hay of Muirie, advocate, his recognition

against Powrie and others, (*vide* 5th January 1682,) being advised; the Lords found the infeftment of 14,500 merks was a ground of recognition *quoad suum valorem*, though it was only for relief of cautionry; seeing it was purified by a distress, and they had obtained a decreet of poinding of the ground thereupon, and had entered into possession thereby; and so it was no more an uncertain burden, but was become liquid: as also adhered to their former interlocutor, that an inhibition did not so cut off the posterior contracted debts but it occasioned a recognition, and entered *in computo*. *Vide* 15th and 24th current.

Vol. I. Page 225.

1683. *March* 15.—BETWEEN Carnegie of Phineven and Sir John Hay, in the declarator of recognition, mentioned the 13th March current; the Lords found it was not the resignation, nor the presenting a signature for getting a charter, that stopped recognition, but only the appending the King's great seal, which perfected the Act.

So that, if there were not as many base infeftments prior to the appending of the seal as absorbed the half of the worth of the ward lands, then this could never fall in recognition; and, however, that it could never be reckoned as one of them: but if there were as many prior as amounted to the half, then the public infeftment did not save it, but it fell with the rest. Castlehill, to make a difference between Phineven's case and Cromarty's interlocutor, (23d Feb. 1683,) distinguished between a base infeftment confirmed by the King,—which he confessed stopped recognition, because the said confirmation passed upon more special notice,—and a public infeftment upon a resignation in the superior's hands, which he accepts of course, and is but *actus incompletus*, as Craig, *Feud. lib.* 3, says, till infeftment be taken.

Though this distinction pleased some of the Lords, yet it was waved.

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1683. *March* 24.—Muirie's recognition, mentioned the 13th current, was this day debated. ALLEGED,—The major part of the whole barony is not alienated. ANSWERED,—The whole lands are not erected into one barony, but only lie contiguous, and the charter bears a dispensation for taking a seasine at one place for all.

2do. ALLEGED,—Sir John Hay, by practising with the witnesses, has proven the rent to be much less than truly it is, to the effect the Lords may think that the major part computed by that rental is alienated by base rights. *Vide* 4th December 1683.

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1683. *December* 4.—In Sir John Hay of Muirie's recognition against Poury, &c., mentioned 24th March 1683; the Lords, having advised the depositions anent the rental, found Sir John had proven that more than the half of the ward-lands were alienated, and so recognosced.

But Gray of Balgerno, one of the creditors, being minor, craved to be reponed against this probation, (for the Lords had refused a conjunct probation of the rental against the king and his donatary;) because her tutors offered to prove the half was not alienated, in so far as there were sundry lands, part of the ward-lands, yet were not in Sir John's rental; which he had either concealed, or held lower than what they truly paid.

ANSWERED,—This is not competent now *post didiscita et publicata testimonia*, and that *ob metum subornationis*; for else this would open a door to perjury and suborning of new witnesses, when parties found they had failed in

their former probation. REPLIED,—Minority and lesion should repone against punctilios of form. *Vol. I. Page 248.*

1684. *February* 23.—The declarator of recognition, at the instance of Sir John Hay of Muiry against Poury, &c. mentioned 4th December 1683, was advised; and the Lords having considered the depositions of the witnesses adduced anent the rental, they find them unclear; and therefore grant commission to Forret, Drumcairn, Blair, and Carse, or any two of them, on the ground of the lands, to reëxamine not only these witnesses, but also gentlemen and others there, who know any thing of the true rent of the controverted lands, if more than the half be truly alienated, so as to make all recognosce; and grant diligence for citing witnesses.

This was a great favour to Poury, after probation led, to make a new Act. *Vide* 14th August 1684. *Vol. I. Page 274.*

1684. *August* 14.—The three Lords, *viz.* Pitmedden, Redford, and Edmonstone, commissioned to take the probation in the recognition, Sir John Hay of Muirie against Poury, &c., as mentioned 23d Feb. 1684, went to the ground of the lands; and whereas each party had above 50 witnesses to prove what was the true rental, the Lords restricted them to 20 the piece; and afterwards, on a communing, persuaded Sir John Hay to give Poury 13,000 merks, and him to accept it; and so they agreed this tedious and expensive plea.

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See many other reports of this case in the Index to the Decisions under *Hay* against *Muirie's Creditors.*

1684. *November* 4. HUGH WALLACE and WILLIAM WALLACE *against* BIGGARS.

THE Lords having advised the probation led by Hugh Wallace and William Wallace, *alias* Biggar, his son, upon the declarator raised by them against Biggars in Ireland, as nearest of kin to the deceased Major John Biggar, to hear it found that the disposition given by the said Major to the pursuer was not *in lecto*, but that he was then *in liege poustie*, and came to kirk and market:

The Lords found it proven that he was then *in legitima potestate*, and therefore declared. *Vol. I. Page 306.*

1684. ABERCROMBIE of Fetternier's Lady and ROBERT SEMPLE *against* SEMPLE of CATHCART.

November 4.—ABERCROMBIE of Fetternier's Lady, as sister to the last Lord Semple, is served heir of line to him; as also Robert Semple, as heir-male, is, by their moyen, served heir-male by two services, one general, the other special; though Semple of Cathcart founded on a tailyie by the last Lord to him, failing heirs of his own body. *Vide* 7th November current.

Vol. I. Page 306.

November 7 and 8.—Fetternier and Robert Semple, mentioned 4th November, give in two petitions to the Lords: One craving that the rents of the estate of Semple may be sequestrated during the dependance against Cathcart. The 2d, That the writs and charter-chest of that estate may be secured or sequestrated, till it be found who has best right.

As to the 1*st*, The Lords appointed two factors for uplifting the rents lying in two shires, they finding caution to make the same forthcoming to any who, *ex eventu*, shall prevail. But refused the *2d*, anent securing the writs, in regard there was a process of exhibition of them raised and depending at Cathcart's instance. *Vol. I. Page* 307.

1684. *November* 8. GEORGE COCKBURN.

IN the case between George Cockburn, bailie of Haddington, and ;—The Lords found, That a bill of exchange being drawn upon one in Holland, and protested for not payment, though it was not returned to the party-drawer for many months thereafter, yet he was obliged to accept the same back again, if he had the value in his hands, and had received the money at the giving of the bill; but that he would not be liable for exchange or re-exchange: though the bill bore upon eight days' sight to pay the sum drawn; and so it was not *debito tempore* to offer it back a month after it was refused, allowing a competent time to send it to Holland, and to return it again protested.

Yet it was thought, if I, upon a design to go to London, take a bill of exchange, and afterwards think fit to alter my journey, and not go, I may give back the bill to the merchant-drawer; and if he had received of me the value, he was bound to return me back my money. Others doubted of this.

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1684. *November* 11. —— WALLACE of WOLMET and HUGH WALLACE *against* WILLIAM DUNDAS.

WOLMET, and his father Hugh Wallace, pursuing an improbation of an adjudication led by Mr William Dundas, and they having taken terms to produce it; when he comes to seek certification, it was ALLEGED he could not; because, it being a decreet of Session, all he was bound to do, was to condescend on the date; likeas the pursuer knew that, for his own reduction libelled the date of it. ANSWERED,—This was not competent now, after all the terms were run, but should have been proponed *in initio* before the taking a term to produce.

This being reported by Redford, the Lords found, even *in hoc statu*, it was proponable; and therefore ordained the pursuer to extract it himself, if he insisted. Who then alleged that he needed not, because he craved the grounds of the said adjudication with Mr William's authors' rights to be only produced; and they being reduced, he declared, he only insisted against Mr William Dundas's adjudication, that it might fall *in consequentiam*. *Vol. I. Page* 308.

1684. *November* 12. PATRICK INGLIS of EASTBARNS *against* His CREDITORS.

MR Patrick Inglis of Eastbarns gives in a general bill of suspension against his Creditors, upon this ground, That, they being in possession of all his estate, they ought not to have both personal and real execution, especially Cramond, or such creditors as had signed his *supersedere*. ALLEGED for Mr John Inglis of Cramond,—That any discharge of personal execution he had given him ten years ago, was conditional, and bearing this express narrative, That it was upon the hopes and expectation of his discovering to them the readiest means for their payment, and to maintain and assist them in the possession; *ita est*, it is offered to be proven by his oath, that he concurred and joined with James M'Lurg, and the other creditors, and, in the end of June 1677, got Mr John dispossessed. *2do*, Offered also to prove by his oath, That Cramond signed that protection conditionally, If all the creditors should likewise consent to the same; which many of them did not. ANSWERED,—That the maxim, *causa data causa non secuta cessat obligatio*, holds only *in causa finali*, but not *in causa procatarctica et impulsiva*, where it is only a bare motive and inducement, as here the hope and expectation of his assistance was; wherein if he failed, he was ungrateful, but it produced no action to annul the suspension and *supersedere*.

Yet *donatio revocatur ob ingratitudinem*. And Tiraquellus, *ad regulam illam, Cessante Causâ, cessat Effectus*, and Swinburne, &c. make a great difference *inter causam finalem et impulsivam*.

The Lords found both the allegeances made for Cramond relevant to be proven by Mr Patrick's oath, to this effect, that, if he acknowledged them, he ought then to forfeit the benefit of the *supersedere*. Then the other creditors ALLEGED,—That he could not obtain a general suspension against them for securing his person; because they offered to prove, by his oath, that he had a latent hidden estate undiscovered, over and above what they were in possession of.

This the Lords also found relevant; but he shifted to depone thereanent.

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1684. *November* 13. His MAJESTY'S ADVOCATE *against* LORD CARDROSS, &c.

IN the action pursued by his Majesty's Advocate against my Lord Cardross, Murray of Livingston, Sharp of Houston, Mr John Elies of Elieston, and other heritors, lying adjacent to Drumshorlanmoor, for reduction and improbation of their rights;—ALLEGED for them,—I cannot take a term, because my authors are not called. And being desired to condescend, they gave in a list, not only of their immediate and last authors in the lands, but also of their mediate authors, to the warrandice of whose dispositions they were assigned, and who had no right, but were denuded more than 40 years ago.

OBJECTED, 1*mo*,—The King was obliged to cite no authors at all; and this was but an unnecessary formality, without any reason. *2do*, The most he could notice, was only the immediate last author, and not the whole authors by progress; who had, it may be, right 100 years ago; and, it may be, are named

at random, and were never authors, nor have any representing them *in rerum natura.*

The Lords, on Pitmedden's report, found, That all the authors in the list and condescendence, *quoad* all writs specially libelled as flowing from them, ought to be cited, if the defenders give their oaths of calumny that they are truly authors to them in these lands. But, as to the general clause, " of and concerning these lands," ordain the defenders to take a term as to these, without citing of authors.

The words of the report and interlocutor, as they are written by the clerk, are :—Find the authors condescended on by the defenders, in the list given in by them, must be called *quoad* any writs granted by these authors to the defenders, they giving their oaths of calumny that these persons are their authors; but, as to the general clause of the summons, anent any other writs not granted by these authors, find the defenders must take a term to satisfy the production *quoad* these. *Vol. I. Page* 309.

1684. *November* 14. JAMES BERNARD *against* The BAILIE of CULROSS.

THE case of James Bernard, and the Bailie of Regality of Culross, was reported by Forret. Bernard being pursued there, for defaming his neighbour, and the libel being referred to his oath, he deponed *negative;* but, having omitted to sign his oath, an officer is sent after him, to bring him back again to the court, to see if he would sign it or not; who violently seizing on him by the elbows, a pin scratches the officer's cheek; he scarce felt it till he came up stairs; and, appearing before the Bailie, he asked him who had bled him, and he answering he knew not, he threatened him for colluding with the party, and presently fined Bernard in the sum of as guilty of a riot, blood, and deforcement of their officer.

This being suspended, the Lords annulled the bailie's decreet, as wanting probation, and assoilyied. *Vol. I. Page* 309.

1683 *and* 1684. HUGH WALLACE and W. WALLACE, *alias* BIGGAR, *against* PATRICK EDMONSTON of WOOLMET.

1683. *November* 7.—MAJOR Biggar having disponed his lands of Wolmet to Hugh Wallace's son; and he having raised a declarator, and being minor, they forgot, in the summons and executions, to insert his father's name as administrator to him, and joint pursuer.—Yet the Lords, on a bill, (though the youth was out of the country,) gave his father curator to him, for authorising him in this pursuit. *Vide* 22d March 1684. *Vol. I. Page* 240.

1683. *November* 21 *and* 22.—Hugh Wallace and William Wallace, *alias* Biggar, his son,—having obtained and extracted an act to prove that Patrick Edmonston of Wolmet was alive the time of his service, (which was done upon

a procuratory from him, he being out of the kingdom;) and having taken the 11th of December to prove, and some of the witnesses coming over sooner to town, and they not desiring to send them back,—gave in a bill, craving, though the day contained in the act was not come, yet that they might be examined. ANSWERED,—The act was now a common evident, and the day was as well in the defender's favours as the pursuer's; and so could not be shortened without his consent.

Yet the Lords ordained the witnesses to be received, reserving all their objections and interrogatories. *Vide* 22d March 1684. *Vol. I. Page* 244.

1684. *March* 22. Hugh Wallace, and his Son's probation, against Edmonston of Woolmet, was advised. The case was,—Major John Biggar had, on a procuratory, served Archibald Edmonston general heir to his brother, in July 1675, as mentioned *supra*, 7th November 1683. It was now pretended, that, Archibald being abroad, he was dead before the service, and so it was null; and the right he gave of the reversion, and discharge of the back-bond, to Major Biggar, must fall *in consequentiam*. Hugh Wallace's son, to whom the Major disponed the lands of Woolmet, for obviating this, did raise a declarator that he was then alive. The probation thereof coming this day to be advised, the Lords found it not fully proven, and would not conjoin more imperfect probations to make up a perfect one; but assoilyied from it: yet allowed Hugh Wallace still, upon a commission abroad, (for he died in Germany,) or by witnesses at home, to prove that he was alive after the service, and that against the 1st November next, seeing the pursuer was a minor.

And yet, *supra*, 5th December 1683, in *Pourie* and *Muirie's* case, they demurred to repone a minor *ad probationes omissas*. *Vide* 18th November 1684. *Vol. I. Page* 284.

1684. *November* 18.—The Lords advised the probation led by Hugh Wallace and Woolmet, his son, against Patrick Edmonston, (*vide* 22d March 1684,) for declaring that Mr Archibald, the said Patrick's brother, was alive on the 25th of July 1675, when he was, by virtue of a procuratory from him, served and retoured heir to ———, his elder brother; to validate a discharge he had given before of the reversion of the lands of Woolmet to Major Biggar, and of his back-bond. This was to cut off an objection they had made against that service: That he died between his granting the procuratory to serve and the service, and so the discharge was null.

And there being a farther probation led, The Lords found it fully proven, by the testimonies of the witnesses adduced, that he was alive some months after the service; and therefore declared. *Vol. I. Page* 311.

1684. *November* 19. JAMES and GEORGE BROWN *against* ROBERT LEGGAT and JOHN WILKIE.

JAMES and George Browns, as apparent heirs to Thomas Brown, who died in Holland, gave in a petition to the Lords against Robert Leggat, writer, and John Wilkie, tailor in Edinburgh; craving that they, their wives, and sons,

may, upon oath, exhibit and sequestrate, in one of the clerk's hands, the writs and evidents belonging to the said umquhile Thomas Brown, their younger brother's son, lest the same be abstracted or destroyed; especially the said Robert Leggat being an old man.

ANSWERED,—They were not members of the Session; Leggat having given over his employment as a writer two years ago, for the test; and this in effect is a summons *ad deliberandum* for inspection, and so ought not to come in thus summarily by a bill: and for sons and wives to depone, is a new style.

The Lords ordained the petitioners to insist *via ordinaria* by a process; and refused the desire of the petition. *Vol. I. Page* 311.

1684 *and* 1685. LORD BOYNE *against* The EARL of LEVEN.

1684. *November* 20 *and* 21.—MY Lord Boyn against the Earl of Leven is decided. Ogilvy of Muiry having sold the lands of Inchmartine to General Lesly, Earl of Leven; and the price being all employed for debt, except 8800 merks, for which Leven granted an heritable bond to Muiry; Boyn, as an assignee by Ramsay and other creditors of Muiry, adjudges the right of this bond from Muiry, and then pursues this Leven, Melvill's second son, for payment.

ALLEGED,—1*mo*, *Absolvitor quoad* 6000 merks of this bond, (which bond he proved, by a back-bond, was a part of the price of the lands;) because assigned to Wardlaw of Abden prior to Boyn's right, and transferred by him to James Melvill, for Leven's behoof. ANSWERED,—*Non relevat* against Boyn, who was a singular successor and adjudger, unless intimated prior to the citation on his adjudication, being only a personal right; and that Melvill's right was to Leven's behoof, was not proven.

REPLIED,—Abden was infeft thereon; and so needed no intimation. DUPLIED,—His infeftment was but base, and Muiry, his author, was never infeft.

TRIPLIED,—The said base right was clad with possession, by receiving annualrents.

The Lords found any of thir three alternatives relevant to prefer Leven to Boyn:—1*mo*, That Muiry was infeft. 2*do*, That Abden's base infeftment was clad with possession, prior to Boyn's adjudication. Or, 3*tio*, That Abden's translation was lying blank in the Earl of Leven's charter-chest, and James Melvill's name filled up therein, for Leven's behoof.

Then Leven craved retention for eight bolls of augmentation which the minister had obtained, though, by the warrandice of the disposition, he was secured against all future augmentations. ALLEGED,—This was no legal distress; because, 1*mo*, It was only decerned by the Sheriff of Perth; none being competent judges to it but only the Commission for Plantation of Kirks. 2*do*, The minister was competently provided before, having 800 merks; and so could crave no more. 3*tio*, It proceeded on Leven's own consent. ANSWERED,—That Muiry, in a contract between them, acknowledged this augmentation.

The Lords having advised this debate, in presence, they found, in respect of the correspective writ, *viz.* the back-bond and tack, that the sums in the bond

pursued upon, is a part of the price of the land; and therefore allow retention for the seven years' tack-duty, and the four bolls of the liferent: but find the base infeftment in Abden's person does not import an intimation; and therefore, that my Lord Boyn's diligence of adjudication and executed summons will prefer him, except the defender will instruct that Muiry was infeft upon the heritable bond: and find that the Earl of Leven was not *in bona fide* to make payment, unless he prove that the right in James Melvill's person was to the Earl of Leven's behoof: and find no retention as to the defects of the rental, in respect they are not proven, and the term is circumduced: and find, he ought to have retention of the minister's augmentation, the defender producing the sheriff's principal decreet, whereof a double is only now produced: and allow the retention of the said augmented stipend, according to the price that was paid for the rest of the land, the stock and the teind having been sold at one price. And also sustain the defender's reply, That, albeit they should not prove that Muiry was infeft upon the said bond, yet they offered to prove that Abden was in possession by payment of annualrents; at least, that the debt was paid by the Earl of Leven to Abden, and the assignation was blank in the Earl's charter-chest, before the pursuer's adjudication: and assign the 15th December next to prove the same.

This deduction, sought on the account of the rental, is founded on the Ædilitian edict, and the action *quanti minoris* I would have given you of price, if I had known the rent of the lands to have been less than what it was given up for.

This cause being again heard on the 9th of January 1685, The Lords refused to sustain compensation or retention for the minister's stipend, in regard there was no legal distress before the year 1655; which Ogilvie of Inchmartine, and the Lord Deskford, and Muiry, his sons, were only bound to warrant; and found the sheriff's decreet was no legal distress for constituting the stipend; but allowed compensation for the tack-duty, and four bolls of victual: though it was alleged, that these could not prejudge Boyn, the pursuer, who was a singular successor, and it was not liquid nor constituted before his right. For the Lords found the obligation prior to his right, and that the fiars of the years now produced, proved the prices of the victual, and so instantly liquidated it.

Then it being ALLEGED,—That Boyn was paid, and his debts extinguished, by a sentence of forthcoming obtained by Ramsay his author; and they making faith that this was *noviter veniens ad notitiam*; though it was in a concluded cause, yet the Lords sustained the allegeance, that the pursuer's author did obtain a decreet of forthcoming against Boyn, as debtor to Muiry; and that, at the time of the said decreet, Boyn, now pursuer, was debtor to Muiry, probable *scripto vel juramento*; and assign the 1st February next *peremptorie* to prove. And they proving any ground of debt against Boyn, then allow him to prove paid before the date of the said decreet and arrestment; and ordain my Lord Boyn to produce his assignation from Ramsay. *Vol. I. Page* 311.

1684. *November* 26. MURRAY of POLMAIS *against* STIRLING of CARDEN.

THE Lords advised the report of the visitation made between Murray of Polmais, and Stirling of Carden, upon this point, How far Carden's new built mill, half a mile below Polmais's old Carse-mill, on Bannockburn water, did prejudge the said old mill, by making it restagnate; or did undermine his banks, or spoil his fishing or grass-bleaching: and found this new mill having gone this twelve months only, no measures could be taken of the prejudice it does to the superior old mill, the last winter being extraordinary through the long frost, and the last summer by drought; and so these, being *de raro contingentibus*, could make no rule; *l.* 3. *D. de Legib.* Therefore, they ordained the same visitors to go again upon the ground, and take the height and the declivity of both grounds, and of the two mills, and the prejudice arising from the restagnating, or otherwise, and if it results by Carden's dam-head: for it was alleged for him, that this was *fallacia non causæ pro causa;* seeing, before the erecting of Carden's mill, the Carse-mill and its tail-dam used, by spring tides of the sea, or inundations, to be put in back-water: and witnesses might indeed depone on the effect, for that was obvious and visible, falling under the senses; but the true cause of it did not always appear, and might be very latent.

But the parties were ordained to wait on the Chancellor first, to see if he could agree them. Drumcairn was declined, because the young Lady Polmais, Durie's daughter, was his niece. *Vol. I. Page* 314.

1684. *December* 4. JOHN CRAWFURD *against* PETER BLAIR.

JOHN Crawfurd having raised a reduction of a decreet of the Commissaries of Edinburgh, against his father, in 1653, decerning him, as tutor to William Blair, in the sum of £1800, against Peter Blair, who, on that decreet, had apprised and possessed his father's tenements several years; because the Commissaries had committed iniquity in refusing several articles of the tutor's discharge; and though the pupil's money was in irresponsable hands, yet they made the tutor liable for all:

The Lords found no iniquity, especially *post tanti temporis intervallum.*

But, on the 12th of December, the Lords having re-considered this case on a bill, they loosed the Commissaries' decreet; and ordained Blair to count for his comprising, and Crawfurd for his father's tutorial accounts. *Vol. I. Page* 317.

1684. BECKS *against* PATRICK CRAWFURD.

March 25.—PATRICK Crawfurd, merchant in Edinburgh, against Becks. The Lords having considered the bill, with the pursuer's deposition, They find it proves that Crawfurd was entertained by his defunct master's relict, during the time of the prenticeship, but not that he went two voyages to London, France, or Holland, conform to the obligement in the indentures, to send him;

and find the other points of the defence, anent helping him with the relict's credit, not proven by his oath: but, as to the modification of his damage, for want of insight, upon that account of not being sent abroad, remit the determination thereof to the opinion of Dean of Guild Baird, and Bailie Hall; and, in the mean time, stop the decreet at Becks' instance against the said Patrick Crawfurd.

It was ALLEGED,—That the expense of sending a common apprentice abroad is small, and, considering the short time they stay, needs not (going by sea) exceed £4 or £5 sterling; and by such voyage they can get little insight. *Vide* 5th December 1684. *Vol. I. Page 284.*

December 5.—The Lords having advised the case between Beck and Patrick Crawfurd, mentioned 25th March 1684, anent what modification Crawfurd should have, upon the account he was not sent twice abroad by his master, as the indenture bore: and seeing the two merchants, to whom the Lords referred it, had given no opinion, the Lords modified £10 sterling for his want of insight thereby: though the President thought £5 or £6 sterling enough for such small merchants and prentices in the Lawn Market. *Vol. I. Page 317.*

1684. *December 5.*—SIR JAMES COCKBURN of that Ilk *against His* FEUARS *of* DUNSE.

SIR James Cockburn of that Ilk, against his Feuars of Dunse, for relieving him of a proportional part of the new cess and taxation imposed by the last Parliament 1681.—By the last clause of the 3d Act thereof, feuars, vassals, tenants, and cottars, are bound to reimburse their superiors and masters, of the quotas therein mentioned.

But the Lords found Sir James could not exact from his feuars and tenants, though never so many, above the half of his own stent; else, in some places, a man might get more than his own part of the cess came to.

The interlocutor was:—The Lords found Sir James, by that Act, could not burden his vassals or tenants with more than the one half of the cess he pays for his own lands: and found, as to such feuars as were inrolled in the valuation-rolls by themselves, that they could relieve him of no part of the taxation, because they paid for their own lands; but, as to such as were not valued, who held some heritage of him in feu, and laboured other men's lands as tenants, that they should pay what the said act imposes on tenants, *viz.* £4 Scots; and, if they had no labouring, then £6 Scots; but if they had only a house, and had no trade at all, then that these should be reputed and cessed as cottars. *Vol. I. Page 318.*

1684. *December 6.* A DRAGOON'S HORSE POINDED.

A DRAGOON'S horse being poinded for his debt, he raised a summons of spuilyie, and ALLEGED,—If such poindings were allowed now in thir broken times, his Majesty's service might be easily retarded and frustrated. ANSWER-

ED,—There was no law exeeming their horses, though captions could not be executed against their persons.

REPLIED,—Public utility required this security, as well as it had done in the case of plough-graith, (but that is by a special statute, Act 98th, Parl. 1503;) and, where a soldier is owing me, I have a remedy by complaining to his Captain, who is bound to turn him out of his company, or else to detain as much of his pay as will satisfy the debt.

The Lords, on Drumcairn's report, found it of the nature of a spuilyie, and that the horse ought to be restored *cum omni causa*, and the Dragoon's prejudice refounded, by his attendance in seeking him back again.

See the like formerly reasoned and decided at Privy Council, the 10th March 1681, Major Lyell; but there it was not a common soldier's horse, but an officer's; only he belonged to the militia, and not to the standing forces.

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1684. *December* 10. The COUNTESS of KINCAIRDEN *against* CORNWALL of BONHARD.

THE Countess of Kincairden and Cornwal of Bonhard decided. Bonhard had been tacksman of the Earl of Kincairden's coal and salt at Culross; but had, by letters under my Lord's hand, ground to crave retention and abatement of 5000 merks of the tack-duty. The Countess, as donatrix to her husband's liferent escheat, craves he may count for the whole, and ALLEGED,—She was not bound to stand to these abatements.

The Lords allowed the defalcations, and found she behoved to stand thereto.

Vol. I. Page 319.

1683 *and* 1684. LANCELOT CATHCART and ——— CARLETON *against* JANET RAMSAY and ARTHUR M'GILL of KENBACK.

1683. *March* 13.—IN Cathcart and Carleton's action against Janet Ramsay and Mr Arthur Macgill of Kenback, for the jewels;—the Lords, on Pitmedden's report, adhered to a former interlocutor; and find still, that the executors of Colonel Cunningham, the husband, have good right to pursue for the exhibition of the jewels, without prejudice to the executors of his wife to pursue for her third, and the *paraphernalia*, as accords of the law. And find, That John Ramsay ought to have called the nearest of kin to his decreet of exoneration; and that, they not being called, the said decreet does not exoner him. And find, that John Ramsay is liable upon the trust, notwithstanding of the allegeance that Mr Robert Byers was conjunct trustee with him; and that in respect of the bond bearing John Ramsay to be the depositor, and his not doing diligence against Byers *debito tempore*, for recovering of them. And find, That John Ramsay, as executor-creditor to Colonel Cunningham, has right to affect the jewels and writs, to the value of the debts owing to him;

and allow the pursuers to be heard against the valuation of the jewels made in favours of John Ramsay, in his confirmed testament. *Vide l.* 1. § 25, *et seq. D. Depositi.*

Then, on the 16th of March, a hearing in presence being granted upon the consignation of these jewels in the clerk's hands, and their act for giving them up, the Lords adhered to their interlocutor of the 13th of March, but recommended to the parties to agree.

So that, by this, they find, that the voluntary consignation John Ramsay made of the jewels in their clerk's hands, was not the habile way to liberate him from being accountable for them; all such consignations being *periculo consignantis*, and the Lords not being appointed for such ends: and that he must be liable for them, though they were given up in 1678, by an act of the Lords; seeing Edmonston, who got them up, was not the right person.

This stumbled many, as a hard interlocutor. See 29th March 1683.

Vol. I. Page 224.

1683. *March* 29.—The case between Cathcart and Kenback, mentioned the 13th current, being reported by Pitmedden;—the Lords ordain both parties to prove the following points:—the defenders, That the Cathcarts, cited by John Ramsay to his decreet of exoneration, were Colonel Cunningham's nearest of kin: and thir pursuers to prove their contingency, and that they are truly his nearest of kin; and that the Cathcarts called by him were dead before that. And allowed a conjunct probation to both parties, as to the value of the jewels, and directed a commission to Ireland, for trying the above mentioned points.

Then, upon a new bill, the Lords, 31st March 1683, refused to grant commission to Ireland, for proving the value of the jewels, but allowed the value to be proved only in Scotland; and granted commission to either party. To the pursuers, to prove their own propinquity of blood; and the defenders to prove the persons' propinquity to the Colonel, who are called in their decreet; as likewise for proving the time of the mother's death, and if the Colonel's son out-lived his mother. And, for that effect, recommend to Arthur, Lord Viscount of Granard, to receive the oaths and depositions of such famous witnesses as shall be adduced before him, for proving the points above mentioned.

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1684. *March* 5.—Lancelot Carleton's probation led against Janet Ramsay and Mr Arthur M'Gill, her husband, in the case mentioned 29th March 1683, was advised; and the Lords found Carleton's wife, and the other pursuers, their proximity of blood to umquhile Colonel Cunningham who impignorated the jewels, proven, &c.

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1684. *March* 26.—Mr Arthur M'Gill of Kenback gives in a bill against Mr Carleton and the Cathcarts, mentioned 5th March 1684; representing that Colonel Cunningham, to whom they were confirmed executors, was owing John Ramsay, from whom he had right, a considerable sum of money, for which he had raised a process against them; and, they being strangers dwelling *extra regnum*, it was just they should find caution *judicio sisti et judicatum solvi* in his reconvention, in case he prevailed; that, by their withdrawing, his action might not be rendered elusory and ineffectual.

The Lords would not grant the desire of this bill. See Dury, *9th February* 1628, *Kirkhead.*

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1684. *December* 11.—In Carleton's action against Janet Ramsay and Mr Arthur M'Gill, mentioned 5th March 1684,—The Lords advised the last point of this process, anent the jewels abstracted by Mr Robert Byres; and found it was a *casus fortuitus* on John Ramsay's part, and that he did sufficient diligence for recovery thereof; and therefore assoilyied him from restitution of the same. *Vol. I. Page* 319.

1684. *December* 16. CHARTERIS *against* ———.

IN the case of one Charteris, reported by Castlehill, the Lords demurred exceedingly if they should grant an aliment to one party from the other, seeing they had granted one already, and the process was not yet brought to a close; and that it was *nobilioris officii;* and that such modifications were more ordinarily granted by the Privy Council than by the Session. *Vol. I. Page* 320.

1684. LOCKHART, MENZIES, &c. *against* JOHN ELIES of ELIESTON.

January 8.—Mr John Elies's action of relief against the Co-tutors of William Lockhart, mentioned 16th March 1683, is again reported by Kemnay; and the Lords decern them to relieve him *pro ratis portionibus* of what he shall be decerned in, upon the event of his count and reckoning with William Lockhart: and decern them to concur with Mr John in defending against the said William. *Vide* 24th January 1684. *Vol. I. Page* 257.

January 24.—Mr John Elies of Elieston's cause against Menzies of Culterallers, Lochart of Lee, Robert Chiesly, and the other Co-tutors, (mentioned 8th January current,) being reported by Kemnay; the Lords repel the allegeance proponed for Culterallers, and find him liable as tutor; and decern him to concur with the pursuer in the count and reckoning at William Lockhart's instance; and find he is liable *pro rata* to relieve the pursuer for what shall be decerned against him therein; reserving to his procurators to be heard in the said count and reckoning, upon this point, If he can be liable to relieve Mr John Elies the pursuer of what shall be decerned against the said Mr John, upon any ground arising from his own dole and fraud: and repel the allegeance proponed for the said Robert Chiesley, and decern him to concur in the said count and reckoning; and find him liable to relieve the pursuer *pro rata* of what shall be decerned against him therein: as also decern against the Laird of Lee; and find him liable to concur with the pursuer, and to relieve him *pro rata*. But, if the Laird of Lee his procurators shall apply to my Lord Kemnay, recommend to him to hear them upon any special defences for him not proponed already. *Vide* 16th December 1684. *Vol. I. Page* 268.

December 16.—Mr John Elies's action of relief against Lockhart of Lee, &c. mentioned 24th January 1684, is reported by Kemnay; and the Lords repel the special defence proponed by the Laird of Lee, and likewise the special defences proponed for Culterallers and Robert Chiesly, in respect of the answers made

thereto; and repel the condescendence given in by the said defenders, of Mr John Elies his fraud and dole, in respect of the answers made thereto; and decern the defenders to concur with the pursuer, in defence of the process of count and reckoning at William Lockhart's instance against the pursuer; and declare they shall be liable to relieve the pursuer proportionally of what he shall be found liable in to the said William Lockhart, at the event of the count and reckoning betwixt them.

Lee's defence was, that he acted not as tutor, but by virtue of a separate right, *viz.* the disposition in trust, granted by John Lockhart to him.

Culterallers' and Chiesly's defences were, 1*mo*, The warrants whereon Elieston was found tutor, wanted witnesses, and so they denied Bailie Chiesly's subscription. 2*do*, Elieston was the sole contriver and carrier on of that disposition of trust, and declarator of *liege poustie*, by which the lesion and damage arose to William Lockhart the pupil; *et nemo debet ex suo dolo lucrari, vel actionem mandati contra contutores habere.*

Answered,—1*mo*, There are four parties subscribing; which supplies the want of witnesses, each being witness to one another: as was found on the 22d July 1676, Forret, &c. against Maxwell of Pollock; and on the 20th of February 1680, *Nisbet* against *Bruntfield.* (But these were *in re mercatoria:* And see a contrary decision in Dury, 14*th Feb.* 1633, *Rankine.*) 2*do*, The other warrant has witnesses, and *ob indivisibilitatem actus* it must sustain; as *if I subscribe* a submission before witnesses, and the blank on the other side for the decreet-arbitral without witnesses; as was found in Dury, 26*th January* 1625, *Ferry* against *Johnston.* 3*tio*, As to the fraudulent contrivance, it is denied. *Et dolus non præsumitur, et quævis causa probabilis excusat.* And Elieston truly thought that disposition a valid deed; and, *esto* it had been a fraud, the co-tutors were as deeply engaged in it as he; and so can never liberate themselves from relieving him, on that pretence.

There being bills given in against this, and the parties of new heard in presence; the Lords, on the 28th January 1685, notwithstanding of what is alleged for Culterallers and Robert Chiesly, adhered to the former interlocutor; and ordained them to concur with Mr John Elies in the defence of the process pursued against him by William Lockhart. And find and declare that they are liable to relieve Mr John *pro rata*, of what shall be decerned against him in the count and reckoning at the said William's instance; and particularly of any damage arising to the said William, upon account of the disposition of trust granted by the deceased John Lockhart, and of the decreet of declarator of *liege poustie* thereafter obtained. *Vol. I. Page* 320.

See prior, intermediate, and posterior parts of the Report of this case, *in the* Index to the Decisions.

1683 *and* 1684. Renton of Lamerton *against* The Earl of Annandale.

1683. *February* 9.—The case, Renton of Lamerton, against the Earl of Annandale, being reported by Harcous; the Lords found, the pursuer's and defender's predecessors being two of the six cautioners for the Earl of Home's

debt, and Lamerton having paid the whole, Annandale could not be liberated on his offering to pay his fifth part of the sum, but behoved to bear one half, and the pursuer the other, and so divide the whole betwixt them; because it was notourly known, that the other four, *viz.* Home of Dirington, Sir Hary Home, &c. were insolvent or dead, without any representatives, and so needed no discussion. See this altered 18th December 1684. *Vol. I. Page* 216.

1684. *December* 18.—The Lords *in præsentia* reponed the Earl of Annandale against a decreet obtained by Renton of Lamerton against him, as heir to his father, who was one of the co-cautioners with Lamerton's father for the Earl of Hume, as mentioned *supra*, 9th February 1683; and allow him yet to prove that some of the other co-cautioners have representatives, and are solvent, and so the Earl of Annandale cannot be liable for their parts; and this in respect he was minor the time of obtaining that decreet.

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1684. *December* 18. WILLIAM BECK *against* CRAWFURD of DRUMSUY.

WILLIAM Beck against Crawfurd of Drumsuy is reported by Saline. There being two several bonds granted by Crawfurd, one to Mungo Beck, and the second to Elizabeth Boog his relict and executrix, (though it does not bear nor design her as executrix;) the last being declared to be in satisfaction of a sum owing to her, and no word of the bond due to her husband; and the first being for 400 merks, and the second for 430 merks, (which 30 merks was alleged to be but the accumulated annualrent of the first;) and so the two bonds were neither *ad idem quoad* the sums, nor *quoad* the creditors:

The Lords, before answer, *ad indagandam veritatem*, ordain the writer and witnesses of the second bond to be examined, what was the true cause thereof, and if they heard that it was for the first bond or not. One of the witnesses, being the debtor's brother, was objected against as *testis suspectus et inhabilis pro fratre*; but, being instrumentary, he was sustained; and though the term was circumduced for not bringing in the two witnesses, yet the Lords, on a bill, granted a farther day: and both having deponed, and their oaths being advised, the Lords found it clearly proven that the second bond was granted for the first. *Vol. I. Page 322.*

1684. *December* 20. HUGH WALLACE and The BISHOP of DUMBLAIN *against* The PARISH of CREIFF.

HUGH Wallace, cash-keeper, and the Bishop of Dumblain, competing with the ministers and parishioners of Crieff, about the rents of a prebendary which once belonged to the bishopric of Dumblain, and was suppressed and annexed, to make a part of the minister of Crieff's stipend:—the Bishop alleged that it was never legally suppressed, and the demission of the prebendary was but done

in 1643, when Episcopacy was abolished. The Minister of Creiff said, he had the benefit of a possessory judgment, and could not be quarrelled *hoc loco*.

The Lords found he was not *decennalis et triennalis possessor*, because the Bishop had interrupted within the 13 years; and therefore preferred the Bishop.

Vol. I. Page 323.

1684. *December* 23. BRUCE of BORDY *against* JOHN KIERIE.

IN a cause between Bruce of Bordy, and John Kierie, chamberlain to the Earl of Mar, the Lords loosed a decreet led upon probation by witnesses, so far as to ordain the depositions to be put by the clerk into the President's hands, that he may revise and peruse the same; and, as he reported, the Lords did incline to re-consider the same, if they should re-advise proven or not; though this may reflect on their former advising. But they did the like for the *Marquis of Queensberry* in his process against the *Children of Douglas of Monsuall*, on the *20th of December* 1682. *Vol. I. Page* 323.

1685. *January* 7. CORNELIUS VANHEYDE *against* JAMES GRAHAM.

ONE Cornelius Vanheyde, a Dutchman, pursues James Graham, late bailie of Edinburgh, on a bond granted by one whom he had intrusted as merchant and factor in a ship, *actione institoriâ*. ALLEGED,—He offers to prove that the man was furious the time he subscribed the bond. ANSWERED,—*1mo*, He took not the fury till he was coming home in the ship; and, if he was subject to it before, he was in a lucid interval when he gave it; for it is all written with his own hand. REPLIED,—That is no argument; for it was all dictated to him.

Yet a madman will not readily write as he is directed. But, in regard Bailie Graham had given a bond of corroboration of this debt, the allegeance was repelled, especially seeing it depended on an onerous cause; though the Bailie pretended, that the price in the bond was most exorbitant, and his prentice's *mania et rabies* did not consist with his knowledge at the time he signed the corroboration.

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1676, 1677, 1679, 1682, 1683, *and* 1685. SIR ALEXANDER and SIR PETER FRASER of DURRIS *against* JAMES HOGG of BLERIEDREN, and JEAN LINDSAY, Lady Bleriedren.

1676. *June* .—SIR Alexander Fraser of Doors, principal physician to his Majesty, against Hog of Blyriedren.

The Doctor, as having right to the reversion of the lands of Bleriedrene, causes use an order and pursues a declarator of redemption. In which, *1mo*,

there are several objections proponed against Kilmundie's factory, not expressly empowering him to use an order, and then against the legality of the order itself, *vix.* that he was not personally premonished, the reversion was not shown nor the money consigned; all which see answered in the information: but there were two principal difficulties. The first was in regard *non constabat* if the defender had a real right derived by progress from Monan *(Monanus,)* Hog, the first wadsetter, since they had not produced any infeftment in their person but merely the contract of wadset and a charter; for, 1*mo*, it seemed if they had never been infeft, that Sir Alexander might, by reduction, maills and duties, or removing, attain to the possession of the land. But we found *res* was not *integra* as to this, because he had accepted his right and disposition with the burden of that wadset of Bleiriedrene, and so would never be heard to impugn and quarrel the same.—*Infra, numero* 488, *Abotshall* and *Kinloch.*—*Secundo*, It was doubted how the defender should validly renounce, and Sir Alexander safely give up the money, if none of them were found infeft; for a renunciation upon a general service were not secure. The only way to establish the right validly in their person were either upon bonds granted by this defender, apparent heir, to adjudge the right from him; or to wair the money upon other land to be liable in real warrandice. See thir points and sundry other pretty things marked in another paper book *alibi.*

The second difficulty was,—The reversion bore a provision that Hog, the wadsetter, should have a tack of these lands for nineteen years after the redemption; and they objected against the order, that no such tack was offered and consigned, and so the order was null as disconform to the reversion; which is *strictissimi juris*, and must be fulfilled *in forma specifica.*

Answered for Sir Alexander,—The tack was exorbitant and null, as contrary to the 19th Act in 1449, Ja. 2d,—the tack-duty being only £16 Scots, and the rent 1000 merks by year, and the sum of the wadset but 3000 merks; so that they have bruiked since 1596, (which is the date of the contract of wadset,) an intolerable and lucrative bargain.

Replied,—The said Act of Parliament meets not this case; because the wadset proceeded upon an excambion of other lands, then disponed to the Earl of Marshall, wadset granter, and it bears Hogg to have had a rental on the wadset lands, and they were of little value then; so that the onerosity of this wadset was not merely the 3000 merks given, whereupon it is declared redeemable, but also the excambed lands, the rentals and liferents Hogg had of thir lands; and, in contemplation of these, that this nineteen years' tack was provided.

Duplied,—*Primo*, the said nineteen years' tack was only to have been given in case it had been redeemed before the decease of the granter or receiver. *Secundo*, The nullity of such tacks founded on that Act James 2d is allowed to be proponed by the granter himself and his heirs; *ergo, multo magis*, by Sir Alexander, a singular successor, who is not obliged to debate anent extrinsic qualities and causes of granting that wadset; and the narrating the excambion was only to found regress in case of eviction of the wadset lands, which *inest de jure.*

The debate being reported by Castlehill to the Lords, they declared they

would hear that point anent the excambion in their own presence. And Sir G Lockhart thought it a very narrow, strict, and unfavourable point on Sir Alexander's part, and that it was probable the Lords would, before answer, ordain the value of the excambed lands to be condescended on and proven; which, with the tacks the first wadsetter had of the wadset lands to run, the time of the granting the wadset, they would find onerous to sustain this nineteen years' tack after the redemption, and not cause it fall under the Act of James 2d, which is only founded on natural equity; condemning such advantage as intrenching upon usury, and as a too great inequality in human pactions and contracts, and supposing lesion *ex eventu ultra dimidium justi prætii* to be downright fraud and circumvention; and therefore repone against it. *Vide L. 2 C. de rescindenda Venditione.*

But the foresaid onerous causes conjoined take off the inequality of this contract; and upon some such like considerations the Lords have sustained such tacks, and particularly on the *21st of January* 1662, *Home* against *Laird of Polwart*, because it was a part of his portion natural. See Durie, *20th June* 1629, *Keith* against *Ogilvie*. *Infra*, July 1677, No. 631.

Sir Alexander has compounded the plea with Bleriedren, and gives him, besides the 3000 merks of wadset, other 3000 merks, to quit his tacks. *Vide infra*, a plea with the relict, No. 631. *Advocates' MS. No.* 481, *folio* 249.

Jean Lindsay, relict of Hog of Bleriedren *against* Sir Alexander Frazer of Doors: *vide supra*, No. 481.

1677. *July* 30.—Sir Alexander having agreed with the son, as is there marked, compears the relict, and alleges she will not suffer any decreet of redemption to pass of the wadset of Bleridryne, at Sir Alexander's instance, through collusion of her son-in-law, because she stands infeft in liferent of the half.

Answered,—*1mo*, We repeat all the dispute alleged against her good-son, as competent against her. *2do*, By her contract of marriage, which is the ground of her liferent seasine, it appears she is provided to the annualrent of £1000 as the half of the money of the wadset, in case of redemption; *ergo*, she has no interest to stop Sir Alexander's order from being declared, since she has only personal action against the apparent heir for employing the half of the wadset money to her in liferent; as to which let her age as accords. *3tio*, Her seasine is null, flowing *a non habente potestatem, viz.* her husband, who was never infeft in the wadset lands himself.

Answered,—Her infeftment cannot be quarrelled now *post tanti temporis intervallum*, being granted *in anno* 1633, and so long ago prescribed.—And Sir G. Lockhart thought this a very dubious point, If she could maintain her liferent charter and seasine from her husband, though he was never infeft, when it is quarrelled upon nullity, as proceeding *a non habente potestatem*, because it is past 40 years since the date of it, and so is prescribed; never being questioned as null all that time. *Vide supra, July* 1677, No. 593, *Minister of Prestonhauch* against *His Parishioners*. Or, if the 40 years must be calculated from the date of her husband's decease, since she was not sooner *valens agere*. See my Annotations from Hadington, at Dury, *26th February* 1622, *Hamilton* against *Sinclar*. *Vide supra, June* 1676, No. 483, *M'Morran* and *Robertsone*. If it be

alleged, that an apparent heir, though not infeft, upon production of his predecessor's seasine, will defend tenants in a removing; *ergo*, the relict may defend from being removed, though her husband, from whom her right flows, was only apparent heir and never infeft. But the disparity is evident. This privilege indulged to the apparent heir is personal: *non egreditur illius personam, non transit ad singulares successores*; but Jean Lindsay is only the apparent heir's singular successor: and though he can defend tenants, yet, *qua* apparent heir, he can grant no positive right to another; for apparent heir is not *nomen juris*. In redeeming and using orders upon reversions, *quilibet hæreditarius possessor*, though merely by a subaltern right, must be cited, as Craig thinks, page 167; yea, though it be only a base or latent right; but he says *usufructuarius* needs not be cited. Then Jean Lindsay, of absolute necessity, needed not be called to an order, though it were safest to do it.

Advocates' MS. No. 631, *folio* 298.

1679. *January* 21.—In the action Sir Alexander Fraser of Doors, first physician to his Majesty, against Hog of Blendryne, wherein Jean Lindsay compeared for her interest, (of which, see 30th July 1677,) it being this day debated in the Inner-house, and she alleging her seasine could not be now quarrelled, because these forty years her husband and she had been in possession, without interruption, &c.:

The Lords repelled the allegeance of prescription proponed for the relict, in respect her right is not from a third party, but from her husband; and that his seasine, not having proceeded upon a retour, or precept of *clare constat*, (as the 12th Act, Parl. 1617, anent prescription, requires,) it was not a sufficient title to prescription; and therefore declare in the order of redemption; superseding extract until the 1st of June, betwixt and which time, if the defender can recover the warrant of her husband's seasine, and produce it, they will take the same into their consideration. And the Lords repel the said Jean Lindsay her other allegeance, as to the consignation of the money, and of a 19 years' tack after redemption; and find that it cannot hinder the declarator, upon consignation, conform to the reversion. But find the allegeance relevant against Hog, that he represents his father contractor, to the effect that the relict in this process may insist for affecting the money or tack, for implement of her contract of marriage. And assign the first of June next to the relict's procurators, to prove that Hog represents his father. And ordain them instantly to condescend upon the passive title.

There were many indispensable nullities in her seasine; but, for adminiculating of it, she produced the notary's protocol, which *laborabat iisdem vitiis*. And I minded the Lords of the 22d Act of Parl. 1617, anent the falsehood and vitiation of protocols. *Vol. I. Page* 35.

1682. *March* 29.—The Lords, on Newton's report, repone Hogg of Blerydrein, against a certification obtained by Sir Peter Fraser of Durris; because it did not expressly mention the particular lands, against the writs whereof certification was sought, though the seasine of those lands was narrated therein; Hogg always producing immediately, and debating why he ought to produce no farther. *Vide supra*, 21st January 1679. *Vol. I. Page* 182.

1683. *March* 30.—Hogg of Blerydrein against Sir Peter Fraser, (*vide*

March 29, 1682,) reported by Boyne. The Lords sustain Hogg's interest to reduce the decreet of declarator of redemption obtained against himself, though his title to the lands was as heir to his good-sire, and it was instructed that his father stood infeft, whom he should not have passed over; seeing the decreet now quarrelled was obtained against himself. *Vol. I. Page* 231.

1685. *January* 14.—James Hogg of Bleiridryn's reduction against Sir Peter Fraser, mentioned 30th March 1683, was reported by Boyne; and his general service as heir to his father was found a sufficient title whereon he may pursue this reduction.

Yea, this Session, in a case between Falconer of Kincorth and Kinneir, the Lords found a general service was sufficient to pursue an improbation of the rights of lands; though formerly, in the Earl of Hume's improbation against his vassals, the Earl being debarred with horning, they refused to sustain process at Mr Charles Hume, his brother's instance, as assignee, till he were infeft; which decisions are not easily reconciled.

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See several prior parts of the report of this case in the Dictionary, pages 13,475 and 10,784; and the posterior part of the report in page 15,174.

1685. *January* 17. DANIEL LOCKHART *against* CROMWELL LOCKHART of LEE.

DANIEL Lockhart, as assignee by Lockhart of Heids, charging Cromwell Lockhart of Lee, on a minute of sale, for the price of lands; and the reasons of suspension being ordained to be discussed on the bill:—ALLEGED for Lee,—That he was nominated by the Privy-Council to go to Clidesdale, and administrate the oath of abjuration of the Whigs' declaration to the people there; so his absence being necessary, and *reipublicæ causâ*, no process could be sustained against him, but all behoved to sist during that interval.

ANSWERED,—This was but *causa absentiæ affectata*, sought by himself, and he was but one of more commissioners: and it did not begin for a week; so *medio tempore* this affair might be discussed. Pitmedden demurring how far he might sustain process, and having reported it, the Lords, on the considerations foresaid, repelled the dilator. *Vol. I. Page* 332.

1685. *January* 27. ALEXANDER BOTHWELL *against* ALEXANDER HAY.

ALEXANDER Bothwell having charged Alexander Hay, wright, on his bond for £17 sterling, as the price of some plenishing he was obliged to have delivered to him betwixt and the 1st of January 1685, in respect of his failyie to do it:—the reason of suspension was, that he had offered the goods within the days of the charge of horning; and that the delivery of the goods was that which was *principaliter deductum in obligationem*, and the payment of the price

was only adjected *in modum pœnæ*, or as *damnum et interesse* succeeding *loco rei*, and so was still purgeable, *l.* 91, § 3, *D. de Verb. Obligat.* 2*do*, The charger's instrument, requiring the goods on the 1st of January, was preposterous and null, and so could not constitute the defender *in mora*, because the 1st day of January being the day appointed for their delivery, that whole day was introduced in favour of the debtor in this alternative obligation, *per* § 2. *Institut. eod. tit.*

This being reported by Harcus, the Lords found it sufficient to assoilyie and exoner the suspender, that he offered the goods before the out-running of the six days of the charge, it being *modica mora*; unless he could prove some real and material damage through not getting them on the precise day.

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1685. *February* 3 *and* 5. COLQUHOUN of LUSS *against* ARCHIBALD STIRLING of CARDEN.

THE Lords advised the two points debated in Colquhon of Luss's reduction *ex capite lecti*, against Archibald Stirling of Carden, of a bond of 20,000 merks which the last Laird of Luss gave his Lady, who, after his death, married Carden. The defences against it were:—1*mo*, That the deed was valid, for, after subscribing it, he went both to kirk and market, though the performing any one of the two is sufficient to purge and take off deathbed. 2*do*, *Esto* it were on deathbed, it depended upon an onerous cause, being granted to her in remuneration of her consent to the sale and alienation of the lands of Lochend to Sir Robert Sinclair, advocate, whereof she was first heretrix, and, the time of the sale, liferentrix; and that the said price went toward the payment of Luss's own debt.

ANSWERED to the *first*,—His attempt in going to kirk and market could not satisfy the law; because it was in coach, only from James Dean's house, at the foot of the Canongate, to the Abbey-church; and this going being done with design to validate the Act, he should have walked on foot; but it was *ultimus naturæ conatus*, and he could not go otherwise, and he stumbled in the very short way to the coach, and his Lady and he were in each other's hands; yea, she held him. Though this was but suitable to his quality, to go in coach, and to lead his Lady; yet, at such a time as this, these compliments ought to be omitted and dispensed with. As to the *second*, This bond does not bear it as granted for that cause; and, *esto* it were, she had got an additional jointure besides, which was remuneration enough. And there was 60,000 merks of proper debt affecting Lochend, which exhausted the price *pro tanto*.

The Lords, on the 23d of February, found the deathbed proven; not that they decided the point in general, that every going in coach should imply supportation and deathbed; for one may have the gout in the feet, and no other distemper. See Gomez. *ad regulam Cancellariæ apostolicæ de Infirmis Resignantibus.* But in Luss's particular circumstances, as they were proven, they found he was supported. They forbore advising the 2d point, till they caused some of their number essay an agreement. But that taking no effect, on the

5th of February they advised the other; and found she was sufficiently remunerated *aliunde* for this her consent; and that it was not proven that the said remuneration was either the design or cause of that bond given by Luss to Sir Archibald Stuart of Blackhall, for the Lady's behoof; and therefore reduced it *in totum*. *Vol. I. Page* 336.

1685. *February* 11. DANIEL NICOLSON *against* GILBERT FIFE.

DANIEL Nicolson, writer in Edinburgh, against Gilbert Fife, merchant, and late bailie there, is reported by Harcus. The case was: Major Robert Johnston and Gilbert Fife having made a vendition and excambion of their shares in two frigates; and the privateer, of which Fife promised to give Johnston a 16th part, having gone to sea, and brought in a rich prize, Johnston pursued him before the Commissaries of Edinburgh, for his share of the said prize, and refers the agreement to his oath. Fife depones, That he had offered him a 16th part of that ship before it went out, but he refused it. The Commissaries found this quality of the refusing extrinsic, and therefore decerned. Fife suspending this, he ALLEGED,—It was never a completed bargain; and that Johnston would never have owned nor claimed the said frigate, had she not brought up that prize; and, having been at no expense on the out-reik, *dolus proprius nemini debet prodesse.*

The Lords found, in respect the promise was made by Gilbert Fife in favours of Johnston, that, except Daniel Nicolson, who is now Johnston's assignee, will instruct, *scripto vel juramento*, that Johnston did require Fife to make him a right to that part of the ship before it went out, he had no right to any share of the prize brought in; and therefore suspended the letters *simpliciter*. For they thought it hard that Gilbert Fife should be bound, when there was no document nor vestige whereupon Major Johnston's acceptation of the bargain could be fixed upon him; so that, if a prize had not come up, he might have refused to accept from George Fife the 16th part of that frigate; unless it could be proven to have been *unicus contextus* of a complex bargain.

Then the Lords, by a deliverance, on a bill of the 21st of February, ordained Fife to depone if Johnston out-reiked the frigate, or if he ever desired to do it, whereby he intimated that he looked upon it as his.

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1685. *February* 12. The EARL of TWEEDDALE *against* The EARL of LAUDERDALE and SIR WILLIAM SHARP.

THE Earl of Tweeddale gives in a petition against the Earl of Lauderdale and Sir William Sharp, craving Sir William may be ordained to produce his tack of the late Duke of Lauderdale's estate, by sight whereof, it would appear that

the years of the said tack were expired; and *medio tempore* craved a sequestration of the maills and duties of the lands.

The Lords called for Sir William, and having looked to the tack, and finding it was set aye and while the Duke's debts wherein Sir William stood cautioner, were paid; they gave it back, without allowing Tweeddale a sight of it; and found, Sir William not being now a member of the Session, he could not be summarily convened *hoc ordine;* and refused to sequestrate the rents.

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1685. The Bishop of Edinburgh *against* William Hay, Commissary-Clerk.

January 9.—The Bishop of Edinburgh pursues William Hay, commissary-clerk, for deprivation, on sundry gross malversations. This process being reported by Pitmedden, it was cast on this dilator, that there were but five free days in the second citation; though the Bishop alleged 24 hours, by our custom, was sufficient for the second citation within the town of Edinburgh, where the defender dwelt.

Some of the points he complained of in the clerk were, that, contrary to the instructions given to the Commissaries and their clerks, he had not yearly brought in the registers of the Court to be marked by the Bishop. *2do,* That he had recorded sundry testaments as suffering a bipartite or tripartite division, and by which books he had counted to the Bishop for his quote: whereas the principal confirmed testaments given out by him bore no division at all, whereby the Bishop was cheated and defrauded of a part of his casualty of quote. *3tio,* He had extracted and given out an eik to a testament, as dated in 1666, with a cautioner not then six years old; whereas it was done within these two years. He pretended the Commissaries authorised him to do it. But they denied it; *et in criminibus claris mandatum superioris non excusat.*

There is no clerk, if strictly tried, but may be found to have incurred escapes deserving deprivation; and the Marishall de Monluck's observe as to all ministers of justice, that, without a yearly remission, they may merit capital punishment, is recorded by Pet. Ærodius, *Rer. Judicatar. lib.* 9, *tit.* 7.

The Bishop's design was, if he could not force him to give a new composition, then to see if he could remove him, and to put his brother, Mr Robert Paterson, in the place. *Vide* more of this, 18th February 1685.

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February 18.—The Bishop of Edinburgh against William Hay, commissary-clerk, mentioned 9th January 1685. The Lords having heard his malversations, with the answers made thereto; and particularly, that all committed before the transaction between the Bishop and him, whereby he gave him 4000 merks, must be presumed remitted; (though it may be alleged, the Bishop knew them not at that time, and so was *non cogitatum;*) they ordained, before answer, the Bishop to prove his condescendence, and the clerk to prove his alleviations.

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1685. *February* 19. DAVID FORBES *against* SIR ALEXANDER FORBES.

THE mutual complaints between Mr David Forbes, advocate, and Sir Alexander Forbes of Tolquhon, are advised. Mr David ALLEGED,—That Tolquhon had offered to tash his reputation, by venting, that he had fraudulently given back a bond which Tolquhon had of Arthur Udney's. Tolquhon complained, That he had given him railing and indiscreet language, and said, he had rather see Tolquhon hanged than his own reputation to be stained; and that the privilege of advocates' gowns ought not to be a shelter and sanctuary under which they should be tolerated to abuse gentlemen. Mr David answered, *Vim vi repellere licet;* and what he had said was in his own defence, and so could not excuse Tolquhon who was the first provoker and aggressor: and Law says, *In provocato abest animus injuriandi, et ignoscendum est ei qui voluit se ulcisci provocatus, l.* 14, § 6. *D. de Bonis Libertor.; et crudelis est qui famam negligit; nam difficile in tali casu est justum animi dolorem compescere.*

Yet the Lords found Mr David's carriage alleviated Tolquhon's injury and offence very much; and therefore only reprimanded Tolquhon, and fined him in £100 Scots; with certification, if he paid it not that day, he should be liable in the double; like the Roman actions, *quæ inficiando crescunt.* The highest vote stated was only £200 or £100 Scots. *Vol. I. Page* 342.

1685. *February* 20. SIR PATRICK HUME *against* ROBERT COLT.

THE case between Sir Patrick Hume and Mr Robert Colt, advocates, about the means of one William Hepburn, sutor in the Canongate, was heard. Hepburn having been examined on deathbed, on a petition given in by Sir Patrick Hume to the bailies of Edinburgh, if the money he had lent to the incorporation of the Cordiners there, was the money of Captain Stewart, to whom Sir Patrick was confirmed executor; he confessed, the Captain, a little before his death, had laid £100 sterling in beside him, but that he afterwards called for it, and divided it amongst his soldiers. As also the deacons and masters of the said trade, being examined, (which the Lords found irregular, to examine a man's debtors, to whom the money belonged;) some of them declared, he called it Captain Stewart's money: which he might do, under this pretext, to seek better caution for it.

This cause being advocated, and the oath of Hepburn alleged to contain an extrinsic quality, and that he ought to prove his restoring the money to Captain Stewart; the Lords, on Castlehill's report, found the quality intrinsic, and therefore assoilyied. See Dury, 1*st July* 1624, *Kinloch.*

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1685. *March* 3. The Earl of Tweeddale *against* The Duchess of Lauderdale.

The Earl of Tweeddale, as assignee by the Lady Yester, and her children, pursues the Duchess of Lauderdale, *rei vindicatione*, for the jewels once belonging to the Countess of Lauderdale, mother to the said Lady Yester, and, by her testament at Paris, legated to Lady Yester and her children. Alleged,—1*mo*, That no process could be sustained on the extract of the testament produced; for it was no better than a copy; seeing, after she had subscribed her testament, she, *ex intervallo*, called for a notary-royal and public tabellion, and caused him form a codicil on the back of it, leaving Marishall de Schomberg, Monsieur Claude, minister at Charenton, near Paris, and others, some legacies; and affirmed to him her testament was contained in the other page, (but it was not formed by him, but by the Lady Boghall, in English, which language the notary understood not;) and he subscribes, in respect of her infirmity. Now it cannot be probative, unless the notary had either drawn it, or read it, or retained the principal: none of which was done.

Answered,—It is now uncontroverted, that attests and extracts of principal writs, given under form of instrument by notaries abroad, (who have more trust than ours,) have been received by the Lords as sufficient *per se, ob consuetudinem loci;* as was decided *supra*, 22d July 1681, in the case of Sir William Davidson's children.

The Lords, on this debate, sustained process, Tweeddale either producing the principal testament *cum processu*, or a legal extract thereof, or else proving that this is a legal and authentic extract by the laws and custom of France.

Then, *2do*, It was farther alleged for the Duchess,—That thir being moveables gifted to her by her husband, and in her possession, that presumed property and dominion; unless the Earl of Tweeddale subsume and qualify that her own, or her Lord's possession, was vitious and unwarrantable, *clam, vi, vel præcario*, and instruct *quomodo desierunt possidere*. Answered,—They needed say no more, but that they were in the Countess of Lauderdale's possession at the time of her decease in 1671, and legated by her to the pursuer's cedents: and that, as to jewels of such value, possession was not found title enough, by the Lords, to defend against restitution, in *John Ramsay's* process against *James Wilson and Others*, marked by Stair, 12*th December* 1665. Replied,—The case there was clearly *fraudulenta contrectatio* of Mr Robert Byres, which made them *res furtivæ*, and a *vitium reale* affecting the thing itself, *etiam contra mille singulares successores;* the parties havers neither being jewellers to their trade, nor of that quality to have so rich jewels. Duplied,—The Duke of Lauderdale's way of attaining the possession of thir jewels was as vitious as it was violent; for, after his first Lady's death, by his influence and power with the French king, without confirmation, or any other title, by concussion and terror, he got that king's warrant to take them from Lady Boghall, on this pretence, that the goods of strangers dying in France belonged to the king, as *nullius et caduca, jure albinatûs;* whereas she, being a Scots-

woman, was not an alien nor aubeine, but a naturalized regnicole; as appears by our Act of Parliament 1558, and from Servin and Bacquet in their *Plaidoiez.*

3tio, ALLEGED for the Duchess of Lauderdale,—That thir jewels having been given by the Duke of Lauderdale to his first Lady, *stante matrimonio,* at least bought with his money, she having an hydropick insatiable thirst after such bagatells, which being a donation *inter virum et uxorem, stante matrimonio,* was revocable, and actually revoked by him, and given to the Duchess. ANSWERED,—Thir *jocalia,* or *ornamenta muliebria,* did not fall under the communion of goods, nor were they liable for, or affectable by the husband's debts, but were *bona paraphernalia,* and the wife's own proper *peculium,* which she might give away to whom she pleased; and the title *Dig. de Auro et Argent. legat.,* shows, that the *mundus muliebris* was properly her own, and defines what falls under it. REPLIED,—Lawyers were very clear, that *vestes et ornamenta exigui prætii* were reputed to be *simpliciter et absolute donatæ* to the wife; but where they were of a great value, they were only *commodatæ ad usum, ut cultior et ornatior videretur*; *ll.* 29, 30, and 31, § 8, *D. de Donat. inter Vir. et Uxor.*; and the Italian and citramontane Doctors are very churlish upon this head; and Jul. Clarus, *Recept. Sent.* § *Donatio, quæst.* 10, No. 3, gives this reason for it:—That the *infelices mariti* of this age gratify their wives' ambition in buying them more jewels than they bring of tocher. Tertullian says, *in auribus pendent bina patrimonia et jugera.* Andreas Gayll, *lib.* 2. *observ.* 91, makes it *casus arbitrarius, secundum facultates et nobilitatem mariti,* and the value of the jewels.

4to, ALLEGED for the Duchess,—That the conception of the legacy being to the Lady Yester and her children, this *formula legandi* stated the property of these jewels in the Lady Yester's person; and she had, by an ample renunciation, discharged, renounced, and abandoned all claim she had thereto, in favours of the Duke of Lauderdale her father; and so her children are cut off.

ANSWERED,—The legacy being in thir terms, "to the mother and her children," the termination of the fee is on the children, and the mother is merely liferentrix *et usufructuaria,* and burdened with a *fidei commissum tacitum* to leave and restore them to her children; so her renunciation of them cannot prejudge her bairns.

REPLIED,—By the conception of the legacy, it is neither a conjunction of the two to bring them in equally, nor a *fidei commissum,* but a clear substitution, whereby the mother is stated in the right of these jewels, in the first place, and the bairns only called, in the second place, *ordine successorio,* failing of her, or in case of her not disposing on them. And that this is the true sense of it, appears from thir arguments:

1mo, That, in all writs, especially in latter-wills, *voluntas et mens testatoris est maxime attendenda,*—the meaning and intention being *domina et regina testamenti,* and the words but *cortex exterior, mera apparentia, figura et superficies verborum*; so that, *in quæstionibus dubiæ voluntatis,* the best way to expiscate the defunct's design, is to consider his affection to the parties, and that he who is first named, *et persona prius honorata,* must be likewise *primus in intentione;* so, where the Countess of Lauderdale couples her daughter and her children in a legacy, t must, *ex conjectura pietatis et ordinatæ charitatis,* be construed, first, to the

daughter, and next to her bairns; for the lawyers have borrowed that philosophic axiom from logic, *propter quod unumquodque est tale, illud ipsum est magis tale:* now, *propter matrem,* (as the channel and conduit,) *nepotes ab avia sunt dilecti; ergo mater est prædilecta;* and, on the same presumption, leans Papinian's inference in *l.* 102. *D. de Cond. et Demonstrat.*; approven by Justinian, in *l.* 80. *C. de Fidei-com.* where this question is raised, If *liberi, in conditione positi, censeanter tacite vocati.* For there is a natural order and substitution according to the sibness and relation, whereby the nearer excludes the remoter; and, by this rule, the Lady Yester must be presumed to be first called. See Stair, *tit.* 26, Of Succession, § 2.

2do, As this *ordo verborum et naturæ* teaches us to interpret the clause, as presuming the Lady Lauderdale's affection centered, *primo loco,* on her daughter; so there is another rule to the same purpose delivered by Jul. Clarus, *Recept. Sentent.* § *Testamentum, quæst.* 76, *viz.* that the testator is presumed to have made his will conform to the disposition of the common and municipal laws; so that, when he institutes the persons who would *alioqui* succeed to him *ab intestato,* he is understood to do it *eo modo et ordine quo de jure communi vel municipali ad successionem ab intestato vocarentur.* Now, to apply this rule, the Lady Yester would *ab intestato* succeed to her mother, and exclude her own children; *ergo* the like must hold *in hac formula legati.* The same Clarus, *Dict.* § *quæst.* 80, holds, that, where a grandfather institutes his son and grandchildren, they are not called, *simul et semel, ordine simultaneo,* but *ordine successorio*; and that it is not a *fidei-commiss.* upon the son to restore *post mortem* to his bairns, but *mera substitutio vulgaris*; so that the first person has the power of disposal on it at pleasure. F. Mantica, *lib.* 4. *de Conjecturis Ultim. Voluntatum, cap.* 7, debates this point very subtilely, and lays down his first conclusion, that such a conjunct institution is not simultaneous, but successory. But there is none of them all so express on the subject as Everardus, *loc.* 1, *num.* 4, where he says, *Ubi plures personæ, inter quas cadit ordo charitatis, inter se subordinantur per copulam, non tamen concurrunt simul, nec faciunt sibi partes per concursum, licet hoc videatur esse de natura copulæ, sed veniunt ordine successivo.* And Anton. Faber. *Cod. Sabaud, lib.* 6. *tit.* 8, shows it was so decided with them *in linea descendenti, sed non in collaterali,* in 1588; and all this is borrowed from the doctrine of the great Bartolus, who stands for this opinion in his Commentary *ad l.* 27. *D. de Liber. et Postum.*; yea, goes a greater length, that, though the testator should invert the order, and name the *nepotes ante filium,* yet *ordo naturæ* would call the son first. There is a parallel case in *l.* 77, § 32. *D. de Legatis,* 2. And Ludov. Romanus, *singular.* 67, says, *Immunitas alicui et filiis relicta, ordine successivo intelligitur.*

If the Lords should find that the children came in for their share, as well as the mother, then Tweeddale's advocates intended to urge that the division behoved to be *in capita;* so that the jewels should divide into six parts, there being five children, and they to carry five parts, and the mother, who had renounced, only one. But this is expressly contrary to the analogy and interpretation of all law and lawyers: for Mantica and Clarus, *ibid.* tell us, the whole children, in such a case, *propter unitatem sermonis, in unum quasi corpus sunt redacti, et sic conjuncti unius quasi personæ potestate funguntur, et pro una*

habentur; so that the division will fall equal; the mother to get one half, which she has discharged, and the children the other half among them.

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1685. *March* 4. Sir James Stewart *against* John Stewart of Ascog.

Sir James Stewart, as Sheriff of Bute, pursues Mr John Stewart of Ascog, advocate, for reducing his right to the crownry of Bute, and for declaring his lands free from the custom and casualty of so many oats, &c. payable to the crowner's office, formerly belonging to the sirname of . The reasons were:—1*mo*, He, being a member of the Session, had bought this right while depending in a plea. 2*do*, He acted and exercised the said jurisdiction before he had taken the test. Ascog denied both; but objected against his title of Sheriff, seeing both the *officium vicecomitis et coronatoris* are consistent in one place, and the one needs not interfere with the other.

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1685. *March* 4. Anent Witnesses to Testaments.

This point was debated, if a testament was null which had only two witnesses, whereof one had a legacy left to him, and so was a party interested and concerned in the subsisting of the testament. By the Roman law it was not a sufficient objection, § 11, *Institut. de Testament. ord.* But Vinnius, in his Commentary, is not well pleased with this, and thinks it was more tolerable *jure civili*, where they had *copiam testium*, than now with us. Some thought the testament only null as to his own legacy, seeing he could not be *testis in re propria*, but valid *quoad* all the rest.

Yet, in a bond of warrandice, or relief, one of the creditors concerned in the relief may be a valid and probative witness, because he has only a consequential interest.

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1682 *and* 1685. The Case of the Patience and Palmtree Ships.

1682. *February* 14.—The case of the two prize-sloops, called the Patience and Palmtree, of Sunderberg, was this day debated, the Duke of York being present. It was argued how far the Lords might review their own decrees. See the 12th Act of Parliament 1661, and *Bouritii advocatus, c. de Revisione.*

The King's Advocate had this compliment to his Royal Highness, that to

speak of marine cases before his Royal Highness, who was so expert therein, was as impertinent as Phormio's harangue to Hannibal concerning the art of war.

The Lords found these ships had carried double documents; yet, to pay the more respect to his Majesty, they referred the whole case to him.

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1682. *November* 24.—The case of the Patience and Palmtree ships, (mentioned 14th Feb. 1682,) was this day advised, and decided against the capers, in favours of the strangers; finding them to be free ships, and so reducing the admiral's decreet which had adjudged them prizes; and the capers are made liable *in solidum* for restitution.

Their refusing to show their documents or passes to the capers or privateers is a great presumption of an enemy's ship, and that it is unclear. Yet it is no probation, for ships may be unwilling to show their passes for fear privateers may destroy them; yet it is a ground to bring them up, and to assoilyie the privateer from damages and expenses for so doing. But it is not a sufficient ground whereupon these ships can be adjudged. *Vol. I. Page* 196.

1685. *January* 22.—The Lords sequestrated this forenoon for advising and deciding the famous and oft debated cause of the capers of the two prize Danish ships, called the Patience and Palmtree, mentioned Nov. 7th, 1684. It was now debated, that the King's letter could not take away the strangers their decreets absolvitor *in foro*. 2*do*, They argued, they were not in the case stated in the King's letter.

There arose a great dissension, if the proving that they carried either double or concealed documents, any one of them was sufficient to confiscate the ship, or if they behoved to prove both,—whether it was the *and* copulative, or the *or* disjunctive. Though some lawyers inclined to think any one of them sufficient, yet many of the Lords were for adhering to their last interlocutor, that they were free ships; but that the capers had probable grounds to bring them up, and therefore assoilyieing them from all damages, and finding them only liable for the value as they were rouped. But the Statesmen carried it, that the case should be remitted to be finally decided and determined by the King. So, if his Majesty pleases, he shall get causes enough to hear, by this his cumulative power. *Vide* another letter from the King anent these ships, 5th March 1685. *Vol. I. Page* 333.

1685. *March* 5.—There is a letter from his Majesty, anent the two ships called the Patience and Palmtree, mentioned 22d January 1685, explaining his brother's letter, and declaring them lawful prize, because of their double documents. This was procured by Sir William Bruce, then at London. And thus John Inglis, advocate, *multam operam et oleam perdidit* in this cause.

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1685. *March* 6. CALDER of MUIRTON *against* The LAIRD of BRODIE.

CALDER of Muirton having charged the Laird of Brodie on a contract, for

delivery of eight last of salmon yearly, towards paying him £10,000 Scots, which he had lent Cromarty, for whom Brodie had become cautioner; the price of each barrel being £16, and the price of each undelivered barrel liquidated to 40 merks; with annualrent from Martinmas, which was the time of the delivery:—the reason of suspension was, That this was truly *mutuum*, being the loan of £10,000 Scots; and therefore, his just interest resolves into principal and annualrent, and he cannot claim farther.

ANSWERED,—This is truly a mercatorian bargain; and so he must not only have his *damnum emergens*, but his *lucrum cessans*, and he had suffered in both; for, by their failing to deliver the salmon, he, being engaged to others on the faith of this contract, was forced to furnish himself at a dear rate.

The Lords, on Boyne's report, modified, for every undelivered barrel, £4 Scots more than the L.16 which was the price liquidated for delivered barrels, and likewise decerned for the annualrents of these undelivered barrels.

But, on the 19th of March, on the King's Advocate's application, the Lords altered their former interlocutor, and found the contract is *principaliter* an obligation for principal sum and annualrent; and that the salmon is only adjected as the *modus solutionis*, and for his better security; and therefore decern only for the principal sum and annualrents, and assoilyied from the failyies of the undelivered fish, because the annualrent succeeds here as damage and interest, *loco facti imprestabilis*. *Vol. I. Page 349.*

1685. JAMES GORDON, Parson of Banchorie, *against* SIR ALEXANDER BANNERMAN of ELSICK.

February 24.—MR James Gordon, parson of Banchorie, pursues a reduction of a decreet *in foro*, obtained against him by Sir Alexander Bannerman of Elsick; finding that Sir Alexander had the sole right of property and pasturage in the Hair-moss, by virtue of his lands of Cuckston, and that Mr James and his tenants of Airdoch had no right; which was carried by the late Chancellor's moyen.

The reasons of reduction were,—1*mo*, The decreet was *ultra petita*; for Elsick's summons craved but common pasturage; and there being more given him on the Lord's advising, they cutted the summons and scroll of the Act, and interlined the Bruntland beside the Cowford, to make it meet the decreet. 2*do*, Mr James had produced a decreet of perambulation in 1630; and yet it was not considered. 3*tio*, The decreet proceeded only upon half advising, and half probation, *viz.* only of Elsick's witnesses, and not of Mr James's; and only one of them was positive; and yet he deponed he saw them in possession of casting of peats, when, by calculation, it appeared he was then but five years old.

The Lords, having advised the debate, before answer, ordained the summons and acts to be produced; and remitted to the Ordinary upon the witnesses, to take the oaths of Mr George Bannerman, Alexander Deuchar, agent, and the extractor, or any others whom the pursuer shall condescend upon, anent the

alteration of the libel, and when it was; if, after litiscontestation, or after sentence, and upon any other pertinent interrogatories to be given in by either party. *Vide* 6th March 1685. *Vol. I. Page* 343.

March 6.—The case of the Parson of Banchorie against Elsick, mentioned 24th February 1685, was advised. The Lords found, by the deposition of Alexander Deuchar, That the summons and act have been altered, vitiated, and interlined; and the words, "Muir and Moss" added: and therefore they loosed Elsick's decreet, and appointed Boyne, Kemnay, and Carse, to visit the ground, and to take all cognition they think fit, by witnesses, &c. anent the property or commonty therein, and to report betwixt and the 1st of November; and, in the mean time, to endeavour to settle the parties. Mr James Gordon, on a bill, got Drumcairn added. *Vol. I. Page* 350.

1685. JOHN GRAY of CRIGIE *against* The EARL of LAUDERDALE.

February 21.—GRAY of Crigie gives in a bill against the Earl of Lauderdale, craving, in regard he would not produce the disposition called for, but suffered certification to pass against it; that therefore the Lords would examine his witnesses on Lauderdale's deeds of concussion and oppression, in dispossessing the Lord Gray, his author, out of Benby, and other lands, without a right; to lie *in retentis, ad futuram rei memoriam.*

The Lords ordained them to be received, he condescending on them.

Then Crigie gave in a new bill, craving liberty to add extrinsic grounds of Lauderdale's concussing others, as he had done against my Lord Aberdeen; *et quod quisque juris in alium statuerit, æquum est ut ipse eodem utatur. Vide* 6th March 1685. *Vol. I. Page* 343.

March 6.—John Gray of Crigie's reduction against Lord Lauderdale, on concussion, mentioned 24th February 1685, is reported by the Register; and the Lords gave just the like interlocutor here as they gave in Lord Lauderdale's reduction against Aberdeen, allowing a conjunct probation: Crigie, to prove the dispossessing him, and keeping up his papers till he ended; and Lauderdale, to prove that he entered by virtue of a right, and gave an adequate price. *Vol. I. Page* 350.

1684 *and* 1685. The ADMINISTRATORS of HERIOT'S HOSPITAL *against* SINCLAIR and STEVENSON.

1684. *February* 5.—THE Magistrates and Ministers of Edinburgh, as administrators of Heriot's Hospital, pursue a reduction of a tack set by them, in 1678, to Sinclair and Stevenson, of the Canon-mills, as done by private contrivance, and to the lesion of the Hospital; (who enjoy the privilege of minors;) it being set for 2300 merks for nineteen years, whereas 1000 merks more yearly was offered; and it was set in sundry particulars contrary to the statutes of that Hospital: and though it was answered, that the tacksman was

not bound to know these private statutes, yet *scire tenetur conditionem ejus cum quo contrahit;* and Heriot, a donor, might annex what qualities and conditions to his gift he pleased.

The Lords, on Castlehill's report, before answer, ordained the foundation and erection, or mortification, of Heriot's Hospital, with their statutes, to be produced. *Vol. I. Page 266.*

1685. *March* 10.—The reduction, mentioned 5th February 1684, pursued by the administrators of Heriot's Hospital, against Stevenson and Sinclair, of a tack of the Canon-mills, for 19 years, because of the enorm lesion, &c. being reported by Castlehill; the Lords, before answer, ordained probation to be led, what thir mills actually paid before the setting of this tack; for they considered there was some pique in this cause against the former Magistrates; and that it was not a good rule in locations, what they might have paid, or what they would give now; as also to try the custom anent appending the Hospital's seal to all their deeds, if it be essential or necessary.

The words were:—The Lords, before answer, ordain trial to be taken anent the method, which has been used in setting of tacks of thir mills belonging to Heriot's Hospital, if the samen was done by a public roup, or by intimation, and after warning of all the administrators of the Hospital; and what has been the custom of appending the seals to tacks of the mills or lands belonging to the said Hospital; and if the same has been in desuetude since making of the statutes; and also what rent has been paid for thir mills before the year 1666; and if the same was greater than the tack-duty now paid by the defender; and how long that rent was paid.

And, on the 20th of March, the Lords, on a bill given in by the Town of Edinburgh, allowed them farther to prove, before answer, that, before the setting this tack, responsal persons offered more tack-duty. *2do*, If it was set at the time of the old treasurer of that Hospital his going out, and the coming in of a new one. *3tio*, If the treasurer used to subscribe their tacks.

Then, on a bill given in by the defender, the Lords allowed her also farther to prove,—*1mo*, That, in 1666, the then tacksman's undertaking to pay 500 merks more than she now pays, helped to break him. *2do*, That the importation of malt from Musleburgh was then discharged, and afterwards allowed to the Duke of Lauderdale; which makes thir mills less worth.

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1685. *March* 10. ARCHIBALD GRAHAM, BISHOP of the ISLES, *against* JOHN CHARTERS and GEORGE WEDDERBURN, &c.

MR Archibald Graham, Bishop of the Isles, having charged John Charteris, George Wedderburn, and other merchants of Edinburgh, for £4 Scots, as the price of the teind for each last of herring taken in the seas adjacent to his diocese; they suspended on this ground,—That he has never been in possession of any such teind-duty from them, who are not the slayers and first takers, but only the buyers at the second or third hand; and that all thir *decimæ minores seu vicariæ sunt locales et consuetudinariæ, et tantum in iis est præscriptum quan-*

tum est possessum, et non amplius; and, even in the Popish countries, they are totally regulated by possession, so that sometimes the *quota* is not the *decima*, but the 20th or 30th part. And, on the *24th of Nov.* 1665, between this same *Bishop's Predecessor*, and the *Fishers of Greenock*, as observed by Stair in his Decisions, the Lords found they had prescribed an immunity of paying any teind to the Bishop for fishes taken in their creeks, because he could not prove he had been in possession within these 40 years. And, in the case of *Mr George Shiels, minister at Prestonhaugh*, against his *Parishioners*, mentioned by Stair, *tit.* Of Teinds; the Lords found a churchman's possession of such teinds did only tie the payers, but not others in the same parish, as to such species and kinds as they had not been in use to pay. And the decision recorded by Stair, *13th December* 1684, *Bishop of the Isles* against *James Hamilton*, does no ways prove his possession; but, on the contrary, ordains him to adduce probation of the custom. And, as to the demand of £4 *per* last, it is most extravagant; for, by a decision in Dury, *26th July* 1631, *Bishop of the Isles* against *Shaw*, it appears the price then was only a merk the last: and as to fish taken *in alto mari*, seeing it is not determined how many miles the Bishop's jurisdiction extends beyond the shore, he can claim no teind thereof.

The Lords, upon Harcus's report, found the Bishop could not burden the Merchants of Edinburgh with any such servitude and teind-duty, unless he proved that he or his authors had been in possession of exacting and getting payment thereof. *Vol. I. Page* 350.

1683 *and* 1685. Ross of TULLISNAUGHT *against* GAIRDEN of MIDSTRAITH.

1683. *December* 18.—THE Lords (though it was a concluded cause,) ordained witnesses yet to be adduced, anent Tullisnaught's accession to the vitiation of the paper in question, only upon a letter written by Midstraith's wife, bearing, that there were further witnesses to be got not formerly known.

Animosity arising on this process, I hear, in August, Tullisnaught meets Midstraith in the way, and wounds him.

Quæritur if this assault will make him criminally guilty of the falsehood, as it will make him lose the civil effects of the depending process.

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1685. *March* 10.—Upon advising the improbation pursued by Ross of Tullisnaught against Gairden of Migstrath, mentioned 18th December 1683;—the Lords first committed both parties to prison; and then, after trial, found the bond of thirlage (except as to four bolls of victual yearly,) was vitiated, and of *temporary* was made *perpetual*; whereupon they liberated Tullisnaught, and improved the paper as false, and detained Midstrath in the tolbooth; and the next day voted if he should be referred to the Criminal Court, as art and part, or otherwise accessory. But being chamberlain to the Duke of Gordon, they found he had not made use of it, but only found it among his father's papers; and so *minime constabat* who had falsified it: yet they fined him in L.1000 Scots of expenses to the pursuer, and ordained him to lie in prison till it were

paid. The King's Advocate was so displeased with this lenity, that he threatened, though falsehood was growing daily, yet he would never pursue one of them again, but liberate them all, that they might at last cheat the Lords themselves. *Vol. I. Page* 351.

1685. *March* 11. THE DUKE of QUEENSBERRY *against* THOMAS BORELAND, &c., HERITORS of the KING'S STABLES.

IN a reduction pursued by the Duke of Queensberry, high-treasurer, as constable and captain of the castle of Edinburgh, against Thomas Boreland and the other heritors and possessors of the King's stables, alleging they were annexed property, as part and pertinent of the Castle of Edinburgh;—the Lords, on Castlehill's report, found that the ground being designed the King's Stables in the defender's own infeftments, it is a part of the King's annexed property; unless the defenders can instruct that the same was legally dissolved, or document that there were other grounds called the King's Stables belonging to the Castle of Edinburgh, seeing the 176th Act, Parl. 1593, annexes the King's Stables to the Crown; which must be understood of thir, *unless other* stables be condescended on.

By the 204th Act, Parl. 1594, and Act 11th 1633, it is declared, that dissolutions shall not extend to the King's Castles, which will also include all their pendicles. But the feu of thir stables was long prior to these Acts, *viz.* in King James V.'s time, by virtue of general Acts of dissolution then standing. *Vol. I. Page* 351.

1685. *March* 12. The EARL of SOUTHESK *against* YOUNG of AULDBAR.

See the prior part of the Report of this case, Dictionary, page 7,902.

THE case of the Earl of Southesk against Young of Auldbar, anent the Muir of Montreumont, [*Mons Romanorum,*] mentioned 18th December 1679, was reported by Forret. The Lords find the progress produced by Auldbar sufficiently connected, and prior to Southesk's authors' rights of forestry and keeping in 1582; and therefore decern for his *firth*, and his servitude of pasturage, feal and divot, through the muir, in regard he had proven immemorial possession; though it was ALLEGED that the said muir being a part of the king's property, it was imprescriptible. *Vol. I. Page* 351.

See Stair's report of this case, Dictionary, page 7,899.

1685. *March* 12. ROBERT WHITE *against* The INHABITANTS of DYSERT.

THE case of Robert White, treasurer of the Town of Dysert, against the inhabitants thereof, was reported by Saline. The question was, the second minister of Dysert's stipend is lifted by a contribution and stent: in 1663, the magistrates grant bond to Doctor Honyman, then their second minister, for some arrears of it: and being made liable, not only *ratione officii*, but personally, and seeking their relief by assessing the inhabitants;—they ALLEGED, that this stipend not being *onus reale transiens in singulares successores*, it could affect none but those who had participated of the word and sacraments at the time it was due; and that *nemo debet pro alieno debito molestari*; and that many of the present burgesses were not then inhabitants; and they were *in crassa et supina negligentia* to let it lie over 21 years.

ANSWERED,—That a community or incorporation is a *corpus collectivum et aggregatum quod nunquam moritur, sed perpetuatur per subrogationem*, as Mornacius speaks, *ad l.* 76 *D. de Judiciis*, where the words of Alphenus are very remarkable:—*Populus idem hoc tempore putatur esse qui centum ab hinc annis fuerat, etiamsi nemo ex iis nunc vivat*; for a *societas est ex eorum numero* which are spoken of in *l.* 30 *D. de Usurpat. quæ licet ex distantibus corporibus constant, tamen uno spiritu et vinculo juris continentur.* And Grotius, *de Jure Belli et Pac. lib.* —, *cap.* 9, debates, where a people change their form of government from a republic to a monarchy, *et è contra*, if they must pay the debts contracted by the former state; and resolves it *affirmative*. And Le Bret. *Plaid.* 43, states our very case, If the new inhabitants of a parish ought to defray the debt contracted by the old inhabitants before they became members; and shows it was decided *affirmative*; *nam quos sequitur commodum eos etiam sequi debet incommodum; et ipse burgus in universali suo tenemento stat*; as Craig speaks, and gives it as the cause why they fall not in non-entry.

The Lords found, this burgh-royal being a society which never dies, the present inhabitants were liable to pay this debt though contracted before their entry. *Vol. I. Page* 351.

1685. *March* 12. WILLIAM HUME, Minister of Jedburgh *against* His PARISHIONERS.

MR William Hume, late minister at Jedburgh, against his Parishioners, was reported by Saline. The Lords found, though he served till January 1682, yet he had no right to the half-year's stipend, from Martinmas 1681 till Whitsunday 1682, because he had deserted his charge for not taking the test; and did not find that he was *in pari casu* with one who had deceased then, whose relict or nearest of kin would have claimed that half-year. *Vol. I. Page* 352.

1684. GRIZELL RAMSAY and ALEXANDER IRVINE *against* ST LEONARD'S COLLEGE, St Andrew's.

1684. *February* 23 *and* 24.—A BILL is given in by Grizell Ramsay, and Mr Alexander Irvine her husband, bearing that she was nearest of kin to umquhile Mr John Ramsay, minister at Markinsh, her uncle; and therefore craving that the Lords would ordain his whole writs and papers to be sighted, inventaried, sealed, and sequestrated, till it were found who had best right thereto.

The Lords granted the desire of the bill, and appointed the Laird of Balfour, and Mr John Anderson, Parson of Dysart, to inventary, at least to sequestrate the whole writs, till it appeared who had best right. *Vide* 12th March 1685.

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1684. *March* 6.—The lately deceased Mr John Ramsay, minister at Markinsh, his dotation and mortification of his lands of Dunnipace in Fife to the College of St Andrew's, making Balmaine and Abbotshall patrons to present the boys, was produced by the Archbishop of St Andrew's; that it might be forthcoming for the College's behoof, and that the schoolmaster who had it in keeping, and gave it up after his death, (it never being delivered by Mr John himself, nor did it bear a clause dispensing with it,) might be exonered.

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1685. *March* 12.—In the case between the Heirs of Mr John Ramsay, minister at Markinsh, and St Leonard's College at St Andrew's, anent Mr John's mortification of his lands of Dunnypace to the said College, as mentioned 6th March 1684, which was quarrelled by the heirs as never delivered in his own lifetime; Sir Andrew Ramsay of Abbotshall gave in a bill to the Lords, representing that the said Mr John had granted a disposition of these lands to his son, David Ramsay, which he had given back, (which ought not to prejudge his son, being minor, *cujus conditionem meliorem facere poterat sed non deteriorem*;) and it was entire and uncancelled; and, therefore, seeing the writs were sequestrated in their clerks' hands, (*vide* 23d February 1684,) so that his executed summons of exhibition could not take effect, he craved they would appoint one of their number to peruse the writs, and deliver up the same to him, that he might compear for his interest, and compete; and that they would stop Lord Edmonston's reporting of the cause between the heirs and the College, till he were heard. Which desire they granted, and nominated Drumcairn to search; and accordingly the said holograph disposition was delivered up to Abbotshall, but prejudice of all defences against the same.

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1684 *and* 1685. THOMAS PATERSON, Minister of Borthwick, *against* MARGARET BANNATYNE, Lady Newhall.

1684. *February* 22.—IN Mr Thomas Paterson, minister of Borthwick, his improbation against Margaret Bannatyne, heretrix of Newhall, and others; Pitmedden having given only eight days for the second term in the improbation, and the Lords' answer being craved, because of the shortness; they ordained the said Margaret's tutors to depone, if they could command the tack and writs called for; and enlarged the *dilatio legalis* to 14 days. This was *casus vere arbitrarius*; but the certification in improbations being very severe, and she a minor, (though the maxim *quod non tenebatur placitare* took not place here, it not being an infeftment,) it was too short. *Vol. I. Page 273.*

1685. *March* 17.—MR Thomas Paterson, minister of Borthwick, his reduction of a tack of the teinds of the prebendary of Vogrie, *alias* Lochquharret, in 1610, against Margaret Bannatyne, Lady Newhall, mentioned 22d February 1684, was advised.

His reasons of reduction were,—1*mo*, It was set *a non habente potestatem*, the prebendary of Vogrie being suppressed by the erection of it into the kirk of Borthwick, by K. Ja. VI. in 1596, as come in the Pope's place, and being in his hands by the annexation of kirk-lands to the Crown in 1587; so that Mr Patrick Bannatyne, prebendary of Vogrie, whose liferent was only reserved by the said erection, could set no tack of these teinds in 1610, to last longer than his own lifetime. 2*do*, The tack-duty being only £20 Scots yearly, and that also payable to the prebendary of Vogrie, and not to the parson of Borthwick; and the teinds being worth 1000 merks *per annum*,—it is a clear dilapidation of the patrimony of the kirk of Borthwick; and yet, by virtue of this null tack, thir teinds have been sacrilegiously detained in laik hands from the church ever since 1610.

ANSWERED,—The said erection was null, being without the consent of the Lord Baccleugh, the Lord Crichton and Bothwell's successor, who was patron of the collegiate kirk of Crighton, whereof the prebendary of Vogrie was a part, and without the demission of Bannatyne, the titular of the said prebendary; and so there was no *modus vacandi* in the king's hands; which is either by deprivation, death, demission, transportation of the incumbent, or excambion and permutation, or by suppression or union of benefices with consent of the titular; as the canon law requires. 2*do*, It came not to the king's hands by the Act of Annexation in 1587; for though, at the reformation of religion, collegiate churches became suppressed *quoad officia divina*, as being a mere popish institution, appointed for singing of soul-masses, yet not *quoad beneficium*, seeing the said Act of Annexation excepts laik patronages *per expressum*, whereof this was certainly one; for Chancellor Crighton, in 1449, having founded this collegiate church out of his own revenue, he became patron by all the titles by which patronage is acquired in law; *nam patronum faciunt dos, ædificatio, fundus.* 3*tio*, *Consuetudo est in dubiis optima interpres*, and they have been *in possessione præsentandi* ever since. 4*to*, The Archbishop of St Andrew's, by the erection, is only patron of the vicarage, and not of the prebendary of Lochquharret. 5*to*, *Esto* he were Patron, it is expressly reserved by the 2d Act, Parl. 1606. 6*to*, That Act, 1587, only annexes the temporality; but this pre-

bendary of Lochquharret consists of teinds only, which is spirituality. *7mo*, This erection is prescribed, nothing being done on it for 40 years. *8vo*, The prebendary of Vogrie had prescribed a right, being in possession 40 years. *9no*, The tack itself is prescribed, not being quarrelled within that space.

REPLIED,—It is a mistake to think, because the collegiate kirk was of the Lord Crighton's laik patronage, that therefore he was patron of all the parts of that benefice; which runs upon this error, that a collegiate church must always be considered as one individual benefice, so as the Lord Crighton, who was patron of the provostry of the said collegiate church, should be also patron of the haill members thereof; which was the case of sundry collegiate churches in Scotland, as Lincluden, founded by the Douglasses, &c. But, in this collegiate kirk of Crighton, there were *diversa beneficia et prebendæ*; and though the Lord Crighton was patron of the provostry, yet the prebendaries of Vogrie, Arniston, Middleton, &c. were mensal and patrimonial churches of the Archbishop of St Andrew's; and because he consented to the erecting them as parts of the said collegiate kirk in the Lord Crighton's foundation, therefore he reserved to himself the right of presentation to them; so the Acts of Annexation except only the rents, in so far as Crighton was patron, and no farther. See Act 61st, Parl. 1587, and Act 158, Parl. 1592. *2do*, This erection is ratified by the 55th Act of Parl. 1606; the validity whereof cannot be drawn in question before the Session, as was found, Dury, *23d July 1625, Minister of Kirkliston*, and *penult.* of June 1627, *Stuart*; though they be only private Acts, without citation of parties, and fall not under the Act *salvo jure*; *nam par in parem non habet imperium*; *multo minus* the Session, which is inferior, *in superiorem, viz.* the Parliament; and where the Parliament statutes *super nullitate alicujus juris*, and supplies it, as here in this tack, then that right cannot thereafter be quarrelled on these defects of the want of the patron's or titular's consent. *3tio*, This erection could not prescribe, because the presentations from time to time to the kirk of Borthwick stopped it, no more than a modified stipend could prescribe, though neglected to be exacted from one of the heritors for 40 years. And, *4to*, They were *non valentes agere* during all the lifetime of Turnet, minister of Borthwick, who consented to the said tack, and so could not quarrel it. And whereas it is pretended that Turnet, minister at Borthwick, having consented, it was all one as if he had principally set the tack; in which case it would have been valid, as being before the Act of Parliament 1617, restraining such long tacks: it was answered,—It is against reason and the canon law, that the titular of one benefice should, by his consenting to a tack set by a titular of another benefice, dilapidate his own; because he must do it as having right, *et perpensâ ecclesiæ utilitate*; though the personal objection may operate so far as to exclude himself. And it is an immoveable maxim, that prescriptions run not from the date of the right, but only from the term of payment, the existence of the condition, or the ceasing of a reserved liferent, or removal of other impediment; as was found *23d June* 1675, *Brown* against *Brown*. And yet, to take off this, declarators have been sustained, that the debt shall be due at the existence of the term, &c. Even so here, either the minister himself, or the Bishop his ordinary, might have intented an action, that, after him who had consented, these teinds should belong to his successors, ministers

at that kirk. Only, it is to be feared, a minister who has been unfaithful in dilapidating, will neither quarrel it nor reveal it to the Bishop. And, as to the brocard *non valens agere*, it takes only place *in impedimentis juris;* as minority, absence *reipublicæ causâ*, forfeiture, and where there is a *defectus tituli;* but not where the *impedimentum agendi* arises *ex facto proprio*, as here by Turnet's consenting. *Vide* Anton. Faber. *in Cod. Sabaud. lib.* 7, *tit.* 9. Yet the decision in Stair, *last of February* 1666, *Earl of Lauderdale* against *The Viscount of Oxenford*, seems contrary to this; where it was found, that prescription ran not against the Lord Thirlston, because he was excluded during Queen Anne's lifetime, by her liferent, to which he had consented. And for the practick of the *Minister of Prestonhaugh* against *his Parishioners*, it is impossible the Lords could find that prescription ran to save a null tack, without subducing the setter's lifetime; for then, if a minister sets a tack of his whole benefice for a small duty, and continued minister there 40 years, his successor should be debarred by prescription; which were absurd: and the prescription there was only of vicarage teinds. And, as to the dilapidation, though a greater rental cannot be proven to have been rentalled before this tack, and though every disproportion is not sufficient whereon to question ancient tacks on the head of diminution; yet, where the inequality between the value of the teinds and the tack-duty is so vast as here, *rejicit onus probandi* on the tacksman. See Act 11th 1585, anent dilapidations. And though the prebendary's liferent be reserved in the erection, yet that does not give him *liberam beneficii administrationem*, so as to set tacks after his death; for the Act of Parl. 1606, uses the taxative words, "during his life allenarly;" and so, *resoluto jure dantis, resolvitur et jus accipientis.*

The Lords, having advised this debate, with the rights produced, found that the tack quarrelled being granted to the defender's predecessor, Newhall, by the prebendary of Vogrie for the time, with consent of his patron Lord Baccleugh, and with the consent of Sir Gideon Murray of Elibank, then provost of the collegiate church of Crighton, and of the prebendary thereof, (but the major part of the prebendary did not subscribe,) and with the consent of Mr Turnet, then parson of Borthwick, and of the Archbishop of St Andrew's, his patron, amongst whom, or either of them, the right of the teinds of Vogrie behoved to reside, albeit the setter had only a liferent-right himself, that the tack set by them all jointly is valid; and therefore sustain the same, and assoilyie from the reduction: but, in respect the right of the prebendary of Vogrie, the setter, was but a liferent, and that after his death the right of the prebendary came to the parson of Borthwick, (*nota*, the prebendary was always kept up as a distinct benefice, even after the death of that prebend who set the tack; and another was presented who lived till 1674;) therefore find, that the tack-duty of L.20 Scots yearly is payable to the pursuer, parson of Borthwick, since the date of his admission, and in time coming. But, upon a bill of the minister's against this interlocutor, the extracting of the decreet *absolvitor* was stopt till November. And the Lords, having advised the bill and answers, on the 14th November, they refused the same, and adhered to their former interlocutor, unless he would allege something new, and not contained in the former debate.

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1685. *March* 18. DANIEL THORNTON and WILLIAM GAIRDEN *against* DAVID DINMUIR.

DANIEL Thornton and Mr William Gairden, minister of Edinburgh, give in a complaint against Mr David Dinmuir, advocate, bearing, that he, being procurator for the said Daniel's children, made a transaction for them with Forbes of Ballogie and Mr Gairden, about Doctor Maul's money, and yet took the bond of 1600 merks only in name of one of the daughters, whereas they had all a like share and interest; and afterwards took an assignation thereto from her: which looked like *pactum de quotâ litis*, and endangered Mr Gairden to pay it twice, both to him and to the other children.

The Lords allowed them to turn their bill into a declarator that the money belonged to the whole bairns; and having, *ex officio*, examined witnesses thereon, they found Mr David could not have right to the whole, but only to his cedent's share and proportion of the sum. *Vol. I. Page* 355.

1685. *March* 20. GRAY of SHIVEZ *against* The EARL of ABERDEEN.

GRAY of Shivez having raised a reduction against the Earl of Aberdeen, on the head of circumvention and concussion, as to the rights of the lands of Menzies of Balgonie, with an exhibition; he, on a bill, gets the Earl stopped from deponing in the exhibition, till he should have witnesses present to confront with him; for citing of whom they granted a diligence; but declared, if my Lord was not here in the beginning of November next, they would then allow him to depone on a commission at home. *Vol. I. Page* 355.

1685. *March* 20. GAVIN MARSHALL *against* The CREDITORS of BRUCE of CLACKMANNAN.

GAVIN Marshall, chamberlain to Bruce of Clackmannan's estate, for the behoof of his creditors, gave in a bill representing, that the former coal-sinks were now unprofitable and wasted; and therefore craving leave to put down new eyes and sinks, for improving the casual rent.

The Lords, after intimation to the creditors, granted the desire of this bill. *Vol. I. Page* 355.

1685. *March* 20. SIR JAMES COCKBURN *against* The CREDITORS of PRESTON of VALLYFIELD.

SIR James Cockburn of that ilk, as a creditor to Preston of Vallyfield,

gave in a bill much of the same nature, bearing, that the coal-works upon the said lands required much cost and expense to uphold them; so that one creditor is not able to undergo and manage it; and therefore craving, that they would appoint one of their number to use a formal roup of the said lands and coal, and set them in tack for such duty and such term of years as they shall see fit; that the said works may not decay, to the prejudice of the creditors.

The Lords ordained this bill to be intimated in the Outer-house, to see if the other creditors had any thing in reason to offer against it.

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1685. *March* 21. THOMAS LITTLEJOHN *against* ANDREW LITTLEJOHN and WILLIAM CLARK.

THOMAS Littlejohn having given in a petition, bearing, that his father Thomas Littlejohn, tailor, left an opulent estate, but it falling into the hands of Andrew Littlejohn and Mr William Clark, his two uncles, they have dissipated and dilapidated the same; whereanent he hath count and reckoning depending against them; and, in the mean time, they enhance and engross all: therefore craving, seeing he could not close his count and reckoning this Session, the Lords would modify some part of his own estate to him, *medio tempore*, to live on.

It being ANSWERED, that the annualrents of his father's debts were yet unpaid, and behoved to be first satisfied;—the Lords modified L.100 Scots of aliment to him, after the payment of the annualrents. *Vol. I. Page* 356.

1685. *March* 24. ARCHIBALD CAMPBELL *against* JOHN ELIES of ELIESTON.

MR John Elies of Elieston having been charged by Mr Archibald Campbell of Kilpont, for L.10 Scots yearly since 1669, (when the militia was established,) for his proportion of a militia horse, whereof Kilpont was the leader and outputter, and Elieston a contributor, conform to an Act of the Commissioners of the Militia; Elieston, for himself and tenants, having procured a suspension thereof upon compensation, &c.—Kilpont gave in a bill, showing that such charges could not be suspended, nor compensation obtruded against it; for that were to retard and disappoint the king's service; and that the Acts of Parliament 1669 and 1672 ordained all such cases to be discussed by the commissioners of the militia.

The Lords, on Redford's report, recalled and annulled the suspension; and remitted the case to the commissioners of the militia in Linlithgowshire.

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1685. *March 25.* ELIZABETH PITILLO *against* ———.

IN a case between Elizabeth Pitillo and , the following point was decided, and much complained of. My Lord Couper having apprised some lands, his assignee gives a declaration, that, though the legal was expired, yet, if the 1000 merks still resting of the sum should be paid him within two years, he was content to accept of it. The two years expire without payment: he is afterwards called to a count and reckoning, and he defends himself with the legal, which, *ex gratia* only, he had prorogated conditionally, if he were paid; which failing, he was in his own place. ANSWERED,—It was odious to take the benefit of the legal, and he had not declared the failyie, (but it was not conceived in the terms of a clause irritant, and so needed not declarator;) and therefore it might still be purged; especially seeing he had intromitted with the rents, and was paid; but, the public burdens being great, he only wanted about 200 merks of his sum.

The Lords would not give him the benefit of an expired legal, but found it still open, and redeemable by payment of what was yet resting.

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1685. *March 27.* JOHN SMITH and —— HOG *against* DODS.

JOHN Smith, procurator-fiscal of the Sheriff-court of Haddington, and Hog, party grieved, having obtained a decreet against Dods, fining him in L.100 Scots for two riots, in breaking up a barn, &c.,—and he being holden as confessed, suspended upon thir reasons. 1*mo*, That the decreet was truly in absence; for though a procurator took a day to produce him, yet he wanted a mandate. 2*do*, The Sheriff's fine was exorbitant and beyond his power. ANSWERED,—He was at the Tolbooth-door when the cause was called, and yet refused to appear. 2*do*, There were two riots.

The Lords, on Saline's report, found he was guilty of two several riots; and therefore sustained the Sheriff's decreet, and found the letters orderly proceeded for the whole fine. *Vol. I. Page* 358.

1685. *March 27.* JOHN INGLIS *against* THOMAS FISHER.

JOHN Inglis, wright, gives in a bill against Thomas Fisher, his uncle, bearing that, in 1678, when he went to London, he gave Thomas a disposition to his houses in trust, on a back-bond; and that, by his intromission, he is now paid more than all the sums owing him, as will appear by the count and reckoning depending; and therefore, craving the Lords would either put him in posses-

sion of his own land, or else name a chamberlain, or sequestrate the rents in some responsal man's hands, till the event of the count and reckoning.

The Lords refused this bill, in regard it did no ways appear that Thomas was paid.

Then John, by a second bill, craved that he might be ordained to uphold the houses, and not let them go to ruin. *Vol. I. Page 358.*

1685. *March* 28. Sir Alexander Forbes *against* Ogilvy.

Sir Alexander Forbes of Tolquhon pursues Ogilvy of Forglen, brother to the Lord Banff, for taking away a gilded mazer cup out of his house, *rei vindicatione*, for restitution or for the value. The libel was admitted to probation, and witnesses were led thereon, who proved nothing. It was at length discovered, that Tolquhon himself had, some years ago, given in this cup to a goldsmith in Aberdeen to be mended; and he having forgot, it was lying there unrelieved for not paying a half crown for it.

The Lords, getting notice of this, proceeded to advise the cause; though Tolquhon, by a bill, craved they might delay till they examined witnesses, who had laid it in beside that goldsmith, seeing Forglen might have shuffled it in there. And the Lords finding it not proven, they assoilyied Forglen, and ordained Tolquhon to pay 1000 merks of expenses, *tanquam temere litigans:* and allowed Forglen to pursue him at Privy Council, or elsewhere, for defamation. *Vide* 30th April 1685. *Vol. I. Page 359.*

1685. *March* 28. Cathcart of Carleton *against* Boyd of Pinkill.

In a cause between Cathcart of Carleton and Boyd of Pinkill, the Lords reponed Carleton to the possession, and found it was proven to be part and pertinent of his land; and ordained Pinkill to restore the bygone maills and duties intromitted with by him. *Vol. I. Page 359.*

1685. *March* 28. ——— *against* Douglas and Waddel.

One having given in a bond of L.80 Scots to a lad in Mr Rory M'Kenzie's chamber, called Douglas, to be registrate against one Waddel, who wrote in the same chamber; Douglas gave him back his principal bond, and took a dollar from him in hand, with the promise of three more; but having kept a just double of it, he gave the party an extract, who raising horning thereon, Waddel discovered that he was master of the principal bond.

The Lords imprisoned them both, and ordained them to be carried to the Trone, on the 3d April, being a market-day, at 11 o'clock, and both their lugs to be nailed to it, and to stand there till 12, with a paper on their breasts,

bearing their cheatry, falsehood, and unfaithfulness in their trust; and then to return to prison, and Waddel to lie till he pay the debt. Which ignominious sentence was accordingly executed.

Thus little rogues are caught in the cobweb net of our law, which the great ones break through.

Douglas alleged, that Waddel enticed him to a cellar to take a chopin of ale; and there, with the help of a dragoon, violently robbed the bond from him. But this appeared to be but a falsehood.

The Clerk-register, upon this attempt and emergent, proposed to disjoin that part of registrating bonds from his depute's office; it having much hazard annexed thereto, through their being liable for their mean servants, who may be easily bribed to such villanies; and to erect it into an office by itself, and exact caution for it.—This was to bring in a round sum of money from him whom he placed therein. But he having proposed it to the Parliament in June 1685, his deputes gave him a composition to continue it with them; and they are to substitute a particular trustee for that effect. Which provokes some to registrate their writs in inferior courts. *Vol. I. Page 359.*

1685. *March* 28. JAMES CORNWALL of BONHARD *against* The EARL of WINTON.

JAMES Cornwall of Bonhard having denounced and registrate the Earl of Winton at the horn, as cautioner for Sir Walter Seton in a contract of salt, and my Lord having paid the debt, Bonhard was content the horning should be taken out of the register; but George Robertson, the keeper, durst not give it back, lest the Clerk-register should take advantage of him for it; therefore Bonhard and Winton's advocate signed a bill to the Lords, to get their warrant to take out the horning, it being paid, and very recent; and the Register backed it.

Yet the Lords very circumspectly refused it, unless Bonhard deponed that he gave no warrant for the registration: which he did. And so the Lords recalled it as unwarrantable. *Vol. I. Page 359.*

1685. *March* 28. JAMES TURNER *against* ANNAND, &c.

JAMES Turner, cabinet-maker, gives in a bill of suspension against Mr Annand, dean of Edinburgh, and his Kirk-session, for imprisoning him upon a bond he had given to forbear one Widow Biggar's company, with whom he had conversed scandalously, and yet continued therein; as also refused to satisfy for sundry fornications. He pretended, that, these being before the late act of indemnity, they were all pardoned.

ANSWERED,—Kirk-censures and satisfaction for scandals could not be included therein, else all church discipline should be cast loose.

My Lord Drumcairn repelled the reason, and found the letters orderly proceeded. *Vol. I. Page 359.*

1685. *March* 31. The EARL of LAUDERDALE *against* The CREDITORS of the EARL of DUNDEE.

——— SCRIMZEOR, Lady Fintry, as sister and one of the two heirs-portioners and of line to the Earl of Dundee, gives in a bill against Lauderdale, craving the extract of her decreet of exhibition *ad deliberandum*, because he had not compeared to depone and produce for inspection, because he thought he could not exclude her interest.

The Lords ordained the decreet to go forth, if he did not exhibit upon oath, for inspection, betwixt and the 10th of April. Any small production (he deponing that he had not yet fully searched all the Earl of Dundee's papers,) will stop this decreet. *Vol. I. Page* 360.

See the subsequent parts of the report of this case, Dictionary, pp. 6487 and 6490.

1685. *November* 7. ——— *against* LORD MARSHALL.

A WADSETTER of my Lord Marshall's adjudging for his sum, and the Earl offering to give him particular lands and a progress; the Lords refused to restrict the wadsetter to such a special adjudication of particular lands only, because the Earl did not purge the incumbrances condescended on, affecting the lands offered, as the 19th Act of Parliament, 1672, provides.

It was *queried*, Where one adjudges a debtor's lands on his own bond, if the bond ought to be registrate, or a charge of horning to be given, prior to the summons. Some writers thought, if it was an heritable bond secluding executors, or bearing a destination of infeftment, it ought at least to be registrate, because comprisings (in whose place adjudications are now surrogated) required it. But adjudications have their own particular form (*quæ dat esse rei,*) prescribed by the said 19th Act of Parliament 1672. *Vol. I. Page* 372.

1685. *November* 10. ANDREW ATCHISON *against* WILLIAM LAING.

ANDREW Atchison, writer to the Signet, pursues William Laing, on this ground, That Andrew had subscribed many letters and suspensions for him, and so he ought to pay him eighteen shillings Scots for each sheet, conform to the regulations 1672. ALLEGED,—That the clients and the employment were William Laing's own, and that he only borrowed Mr Atchison's name, because he was a free admitted writer; and that it was ordinary between masters and their prentices to take only 10 shillings for the sheet, they being at no trouble but only their subscriptions.

The Lords, in regard it was attested by some writers to be their ordinary practice so to divide it, and that it was William Laing's own employment, and

the letters were dictated by him to his own man, therefore they decerned him to pay 10 shillings Scots for every one he had confessed, and allowed retention of the other 8 shillings to himself.

Andrew-Atchison having, in a bill, complained that this was against the acts of the writers, to let other men's servants write their summons or letters; the Lords ordained the boy to be examined: who declared he was truly William Laing's man, and alimented by him; but his master lent him to Andrew Atchison by paction, to save that act of the writers.

Yet the Lords adhered. And the writers were resolving to fine Andrew Atchison for breaking the act, and colouring unfreemen: but he threatened to acquaint the Secretaries, his masters, to whom, at their entry, they paid of dues near 1000 merks; and yet the Lords brought in their servants *pari passu* with them, without putting them to prove there was a paction for communicating the gain. But the Lords thought it materially just, that he who was at a part of the pains should also have a share in the gain. *Vol. I. Page* 373.

1683, 1684, *and* 1685. Doctor Livingston's Relict and Children *against* The Earl of Winton.

1683. *March* 15.—In the action, Barbara Burnet, relict of Doctor Livingston, against the Earl of Winton, my Lord Castlehill found the registration of a bond after the creditor's decease lawful; seeing the debtor who gave the mandate for registrating it, was still alive. *Vide* 22d current.

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1683. *March* 22.—Burnet against the Earl of Winton, mentioned 15th current, reported by Castlehill. The Lords sustained Winton's declarator upon the trust Doctor Livingston had from him, so as, before answer, to ordain witnesses to be examined thereupon; as also sustained the Earl's allegeance of compensation upon the Doctor's intromissions with the Earl's rents, notwithstanding of the discharge; and ordain both parties to count and reckon. But, in the mean time, for her aliment, decerned the Earl of Winton to pay her the hail bygone annualrents of the 6000 merks bond, which he does not allege was in trust, with 1000 merks of the principal sum thereof. And the Earl requiring caution of her to refound, in case, in the event of the count and reckoning, the Doctor should be found paid by his intromissions, and the Earl not found debtor; this caution the Lords refused to exact from her: but, on a bill given in by the Earl, they retracted the 1000 merks given her of the principal sum.

The words of the deliverance were:—Ordain the decreet to be recalled, (for her agent had extracted the act and decreet wrong, and in great haste,) and to be put into the clerk's hands, and to be rectified; allowing the declarator of trust, and count and reckoning for the husband's intromission, to proceed; and, before answer, ordain witnesses to be examined on the grounds of the declarator; and ordain the decreet to have effect only as to the bygone annualrents

due, but as to no part of the principal sum of 6000 merks. But do not burden the relict with finding caution to refund these annualrents if, *in eventu*, there should be less due. *Vide* thir parties at the 19th current. *Vol. I. Page 228.*

1684. *March* 19.—The Relict and Children of Doctor James Livingston gave in a bill to stop any witnesses to be received at the Earl of Winton's instance, in his declarator of trust; that the bonds he was pursued for, granted to the Doctor, were but in trust, the said Doctor being then his menial and domestic servant. Against which, they ALLEGED,—That clear liquid bonds, bearing for borrowed money, could not be taken away by a congestion of presumptions, of which this declarator of trust was made up.—Yet the Lords adhered to their former act, (23d March 1683,) and ordained the witnesses to be received, seeing it was only before answer, and the relevancy was entirely reserved, to be considered when they should come to advise the probation.

In this process, the Earl also repeating his action of count and reckoning against the Doctor's representatives;—they ALLEGED,—That they were not bound for any years preceding July 1676, because the Earl had then given him a general discharge. Whereon a debate having arisen, the same was advised the 21st March, whether it should defend against counting for intromissions preceding its date, seeing it appeared it was but a mere trust to help forward his marriage, and was truly granted without any previous count; and bore a false narrative, that the instructions of the counts were given up to the Earl, which were still in the Doctor's own hands long after; and that the said discharge was past from, by the Doctor's giving in the accounts of those very years which fell under the general discharge, to the Earl, and accepting a receipt subjecting them to his approbation, whether he would allow them or not.

The Lords, before answer, ordained Sir Walter Seaton and James Inglis (to whom the adjusting the accounts, by the receipt, was referred,) to be examined, whether the Doctor himself did not give in to the Earl and them, the accounts of the years preceding the general discharge now founded upon, as well as those posterior; and if he did not subject all to be allowed or disallowed by the Earl.—By this it appears they incline to come over the said discharge.

On the 25th March, Barbara Burnet, for herself and her children, gives in a bill against the Earl of Winton, alleging he had protracted and kept back the count and reckoning betwixt them, and that she clearly proved him to be debtor by liquid bonds: therefore craving, that she might have power, in regard of her present urgent necessities, to uplift the moneys, in whole or in part, upon her obligement to refund them in case he prevailed.

The Lords ordained the Earl to pay her 2000 merks presently, (without putting her to find caution,) upon her bond to redeliver the same, if, either upon the event of the declarator of trust, or of the Doctor's intromissions, these sums should be found not due.

The Lords had granted the same favour to her, in the end of the former Session.

The Earl gave in a bill reclaiming against this, craving it might be retracted, seeing she had *aliunde* to live on: yet the Lords adhered to their former interlocutor. *Vide* 25th November 1684. *Vol. I. Page 283.*

1684. *November 25.*—The Lords, having advised a part of the probation led by the Earl of Winton, in his declarator of trust against Barbara Burnet, relict of Doctor Livingston, mentioned 19th March 1684, found, That the

right of the tack and prorogation of some lands in Winchbrugh, from George Young to Christopher Seton, and assigned by him to Doctor Livingston, was clearly proven, by the oaths of Sir John Dalrymple, Sir Walter Seton, Mr Alexander Drummond, and the other witnesses adduced, to be but a mere trust in the Doctor's person, and that his name was only borrowed thereto; and therefore decerned his children and relict to denude thereof. *Vide* 13th December 1684. *Vol. I. Page* 314.

1684. *December* 13.—The Earl of Winton having given in a bill, craving a prorogation of the protection given to Sir Walter Seaton and James Inglis, to come in and depone as witnesses, in the cause betwixt Doctor Livingston's relict and the Earl, as appointed, *supra*, 21st March 1684; in respect they could not be adduced within the former time, being so short:

The Lords signed a new protection. But Castlehill refusing it, as being contrary to the 9th Act of Parliament 1681, the rest cancelled their names from the protection; but, upon getting back their former protection, and if the bill be reformed, and mention nothing of it, they were content to grant one as if it were the first. *Vol. I. Page* 320.

1685. *January* 16.—The Earl of Winton's declarator of trust against the relict and children of Doctor Livingston, mentioned 25th November 1684, was advised; and the Lords were much straitened how they could take away clear liquid bonds, whereof the subscriptions were acknowledged, but were only alleged to have been elicited in trust, the Earl being *major, sciens, et prudens*, and known to be frugal and provident. Yet, on the other hand, the case was between a master and a servant, who is a domestic and natural trustee, and who, within two months of thir bonds, had got large gratuities and acknowledgments for his service and attendance, *viz.* a bond of 6000 merks and a pension of 1000 merks *per annum*. So thir two bonds neither are nor can be pretended to be donations. And yet, that thir two bonds, the one for 9000 merks, and the other for 5000 merks, are for onerous causes, and borrowed money, (as their narratives bear,) can be as little pretended; for, 1*mo*, The Doctor's patrimony and condition then, is so well known, that it is undeniable he had not the half of it. 2*do*, The sums he gave the Earl are not charged nor carried into any count by him, nor any of the Earl's chamberlains in the year 1676, when the sums are alleged, by the dates of the bonds, to have been borrowed; which would certainly have been, if the Earl had got the money. 3*tio*, It is proven, when he was showing the bonds he got from the Earl, he mentioned the 6000 merks' bond, but never thir two; nor were they ever heard of during his lifetime, but found lying in a cabinet with other of the Earl's retired papers.

Some of the Lords were for examining the writer and witnesses in the bonds, what was the cause thereof, and if they saw any numeration of money. Others were for taking my Lord's oath in supplement of the probation: and others thought it hard to take away clear bonds on such presumptions. But most of them were convinced that the Earl's discharge to the Doctor, founded on by his relict and children, was but in trust, and past from by his giving in his accounts of the years preceding the date of the said general discharge, as well as of the subsequent years, and taking a receipt of the accounts and the instructions from the Earl, with this clause, that the Earl shall, betwixt and the 1st of February 1681, give his opinion whether he approves or disapproves of the same.

However, they forbore to decide it at this time; but recommended to Pit-

medden, Edmonston, and Carse, to endeavour a settlement betwixt the parties, otherwise they would advise it on Tuesday.

The accommodation taking no effect, the Lords, on the 29th of January, having considered the debate, depositions of witnesses, and documents produced for either party, they found the discharge was granted in trust; and therefore ordained the representatives of Doctor Livingston, notwithstanding thereof, to count and reckon; but found that the bonds controverted were not granted upon trust, and therefore sustained the said bonds: and assoilyied from the reduction and declarator of trust, in so far as concerns these bonds; but stop any execution as to the principal sums contained in these bonds, till the event of the count and reckoning: but allow the children and relict to get payment of the annualrent of the sums contained in these bonds; the relict giving bond, that if, by the event of the count and reckoning, there shall be more found due to the Earl than the principal sums, that then she shall repay the same. *Vide* more, 24th February 1685. *Vol. I. Page* 331.

1685. *February* 24.—The Earl of Winton gives in a bill against the Relict and Children of Doctor Livingston, mentioned 16th January 1685, reclaiming, 1*mo*, That they refused to denude of the trust of the tack and prorogation of George Young's lands in Winchburgh, though it was most clearly proven to have been but a trust in the Doctor's person. 2*do*, That the Lords had not ordained her to find caution to refund the annualrents, in case, by the event of the count and reckoning, it should appear they were not due. 3*tio*, That, on misrepresentation, they had gotten my Lord Harcus adjoined auditor in the count and reckoning to Edmonston.

The Lords ordained them to denude of the tack, and allowed Edmonston to be sole auditor; but refused to put her to find caution. *Vide* 11th November 1685. *Vol. I. Page* 344.

1685. *November* 11.—Barbara Burnet, relict of Dr James Livingston, against the Earl of Winton, mentioned 24th February 1685. The Lords having advised the bill and answers, with his bill of suspension of their former decreet against him, and the grounds of it; they find no necessity that the relict petitioner shall now confirm the annualrents to be paid by the Earl, (as he contended,) but that she find caution to repay the same, in case the debt shall not be found due; and, in case the debt shall be found due, that then she shall confirm the same: and the Lords restrict the charge to the superplus above the discharge produced by the Earl; or otherwise ordain the arrestments to be purged before extracting; or otherwise allow the Earl retention of so much of the charge as will satisfy the sums in the arrestments produced: and find the letters orderly proceeded for the superplus,—sufficient caution being found, as said is, before extracting.

Thereafter, a bill was given in by Winton; and the same, and her answers, being advised on the 16th December, the Lords found, That the representation in the bill, as if their former interlocutor was only for the bygone annualrents, is groundless; and that their interlocutors decerned for the annualrents, as well in time coming, during the dependance of the count and reckoning, as for the bygones; and they adhered to the interlocutor, the pursuer finding caution in terms thereof to repay; and refused to ordain the relict to denude of the right of George Young's debt, (which was one of the Earl's reasons of suspension;) without prejudice to the Earl to extract his decreet of declarator of trust,

and to charge the representatives of the Doctor to denude, as accords of the law; and remitted to the Lord Edmonston to bring the count and reckoning to a close. *Vol. I. Page 373.*

1684 *and* 1685. BAILIE JOHN HALL *against* JAMES CLELAND.

1684. *January* 9.—BAILIE John Hall against James Cleland, merchant in Edinburgh, was reported by the Clerk-register. The Lords ordained John Hall of Auldcambus, to condescend upon the onerous causes of that disposition he had gotten from William Johnston, conjunct debtor to him with the said James Cleland, to the effect they might consider if the application he made of the goods disponed was rational; and if he could prejudge James Cleland, a cautioner, by applying these goods to other causes of debt between him and Johnston, who is now turned bankrupt, especially seeing the narrative of the disposition was indefinite, without mentioning one debt more than another; in which case, both by the civil law, *L.* 1 *et seq. D. de Solut.* and by our decisions, (see Stair, *tit.* 11, Liberation from Obligations,) it is always ascribed and imputed *in sortem duriorem debitori.*

This was only carried by one vote, that the onerous causes ought not to be referred to his oath; but he ought first to condescend on them. *Vide* 13th November 1685. *Vol. I. Page 257.*

1685. *November* 13.—THE case of John Hall and James Cleland, mentioned 9th January 1684, was debated *in præsentia*, and advised. The Lords having considered the condescendence given in by John Hall, anent the onerous causes of the disposition of some goods granted to him by William Johnston, whereby he ascribes it to other debts than this wherein James Cleland was bound as cautioner for the said Johnston; they found it did not prove James Cleland's reason of suspension, that this debt behoved to be one of the causes of that disposition, and that John Hall was not obliged to ascribe it *primo loco* to this debt of Cleland's; seeing the narrative of the cause of his disposition was general and indefinite, without mentioning one cause more than another: and though William Johnston was failing at the time he made the said disposition, yet seeing he was not then a notour bankrupt, and there was no diligence done by Cleland the suspender, or any other, against him at that time, that John Hall was *in bona fide* to transact with him, and receive the said disposition, and apply it to the payment of any debts resting to him by the disponer; except it were offered to be proven, by Hall the charger's oath *vel scripto*, that the disposition was granted by the said William Johnston, for payment of this debt charged upon *pro tanto*; otherwise found the letters orderly proceeded.

This seemed hard, when it consisted with most of the Lords' knowledge, that William was then *lapsus* and went to Ireland, so that he and John Hall could not then collude to James Cleland's prejudice, and misapply it, though there were no legal diligence then against him, for he was *in effectu* bankrupt; especially seeing John Hall did not fully instruct those other debts to which he ascribed the disposition, *aliunde* than by his oath.

Then James Cleland offered to prove, *scripto*, that John Hall had given Archi-

bald Johnston, William's son, (who would not otherwise give up the disposition,) a factory to sell these goods, and to count to him for the price, towards payment of this debt of Cleland's *per expressum.* ANSWERED,—*Esto*, yet, before payment, he might alter the destination.

The Lords allowed eight days for a diligence against Archibald to produce that commission. And he having compeared, and deponed that he had given it back to John Hall, and that he produced an exact double of it; and his oath being advised on the first of December, with the doubles of the factory and back-ticket, they, before answer, ordained Hall to depone upon the condescendence given in by him, and his stated account with William Johnston; as also, if he received the disposition from William Johnston for payment of his own debt, in which Cleland was not bound to him, in the first place, or of both debts indistinctly: and superseded to give answer to the 28 hogsheads of tobacco, or price thereof, acclaimed by Bouden, till the result of the process at Bouden's instance against Bailie Hay.

The Lords, on the 28th January 1686, having advised John Hall's oath, with the subscribed account to which it relates, they found the price of the goods, contained in the assignation by Johnston to Hall, cannot be employed for payment of the debt for which Cleland is charged, until first the other debt (in which Cleland is not bound,) resting to him by Johnston be paid: and found the said debts are not fully satisfied by that disposition; and therefore found the letters orderly proceeded, for the sums contained in the charge, in so far as they are not yet satisfied. *Vol. I. Page 374.*

1685. *November* 13. The LORD ABERDOUR *against* SIR WILLIAM BRUCE of KINROSS.

LORD Aberdour, Morton's son, against Sir William Bruce of Kinross. This was a reduction of a discharge of the price of Lochleven given by the last Earl of Morton to Sir William, as being done after he was at the horn; which Aberdour, as donatar to his escheat, now quarrels. ALLEGED,—Aberdour has given a ratification of this discharge. ANSWERED,—This is only for any kindness he might claim or pretend; and Aberdour was not then donatar.

2do, ALLEGED,—The discharge is sufficient, being prior to the gift and declarator, as was found in *Veitch, Pallat, and Maxwell's* case, *November* 1673. ANSWERED,—Payment prior to the gift is sufficient, but not a discharge; and if Sir William offers to prove paid, they will sustain it as relevant.

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1685. *November* 14. EUPHAME ELPHINGSTON *against* JAMES CLELAND.

THE debate between Euphame Elphingston in Gilmerton, and James Cleland, merchant in Edinburgh, is advised, how far he was *in tuto* to pay a sum contained in a bond to one Geddes and his children, which they were not to

uplift without the consent of Alexander Hay. And it being ALLEGED he was dead, and his consent with him, the Lords found his death needed no probation, being notour. And they having led probation, that one of the Geddeses was major, *viz.* a testificate of his baptism, out of the kirk-session's book, signed by the clerk, with the testimonies of some witnesses, that they knew him these twenty years:

The Lords found this probation not sufficient; but authorised one of his advocates at the bar to be his curator *ad hoc particulare negotium*, and to consent to his discharge; and assoilyied James Cleland from the penalty.

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1685. *November* 14. JEAN GRAY *against* CHARLES GRAY.

MISTRESS Jean Gray having charged her brother Mr Charles Gray, advocate, on his bond of 500 merks, he suspended on this ground, That he had right to a vendition of a ship left him in legacy by his aunt, the Lady Newliston, afterwards spouse to Sir Archibald Primrose, the profits whereof she uplifted, extending to more than the sum charged for; and though the ship was in her name, yet it was to his behoof. The Act being extracted as if the charger's advocates had acknowledged that any right she had to that part of the ship was to her brother's behoof, she by a bill reclaimed against it, and craved that her brother might be obliged to prove his right to that ship.

The Lords refused her petition, in regard, 1*mo*, The clerks deponed the Act was extracted conform to the minutes. 2*do*, Her own agent had extracted the Act the same way, and craved circumduction of the term against Mr Charles Gray, suspender, for not proving *scripto* her intromission, and so had homologated the Act by using it;—though her lawyers' concession and assertion, and her agent's ignorant extracting the Act, should not prejudge her.

But Mr Charles having given in some of her receipts, the Lords refused to repone her against the Act, and sustained his ground of compensation to elide the sum charged for, so far as the discharges extended; and ordained the clerk to calculate and compare the sum in the bond with the receipts; and if they either exceeded or equalled it, then they suspended the letters *simpliciter;* but if there was an excresce, they decerned *pro tanto*. *Vol. I. Page 375.*

1685. *November* 17. KER of GRADEN, and his LADY, Petitioners.

KER of Graden and his Lady gave in a petition, bearing they were selling lands, and that there was an infeftment of relief of cautionry, and also of warrandice, affecting these lands, and that the party scrupled to buy them unless the same were either purged, (which could not well be done,) or valued and liquidated to a certain definite sum; which they craved the Lords might do. This was difficult, and got no present answer; for a woman's liferent has some determinate rules of valuation, at 7, 5, or 4 years' purchase, according to her

age or strength; but reliefs and warrandice had not, but according to the probability, greater or lesser, of an emergent distress or eviction, which might either exist or not. *Vol. I. Page 375.*

1684 and 1685. Sir Ludovick Gordon of Gordonston *against* Farquhar.

1684. *February 5.*—The Lords sustained the improbation of the back-bond produced, by way of exception. Though it was acknowledged to be his real subscription, yet it was alleged to be false *in datâ*. Now the date in several cases is essential; *e.g.* the antedating writs truly subscribed on death-bed, to make them *in liege poustie*, or to make them prior to another's diligence. But their condescendence that he was in Edinburgh that day, whereas the writ bears to be signed at Aberdeen, was alleged not to be relevant, seeing a man may in a summer's day be in both these places in one day, it being but seventy miles' distance. *Vide* 18th November 1685. *Vol. I. Page 266.*

1685. *November* 18 *and* 19.—The case of Farquhar, postmaster in Aberdeen, against Sir Ludovick Gordon of Gordonston, mentioned 5th February 1684, was debated and advised.

The Lords found the back-bond produced by Sir Ludovick upon Sir Robert Farquhar's estate null, because it was proven that it was only a blank sheet of paper subscribed, and the tenor of a back bond afterwards filled up in it; and that the date bears at Edinburgh, and yet he was at Aberdeen at the time; and that it had been retired.

It was alleged there was a true back-bond, but it was lost.

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1685. *November* 19. Robert Miln of Barnton *against* The Earl of Annandale, &c., Creditors of Hugh Sinclair of Binny.

Robert Miln of Barnton gave in a bill, bearing, that, at the Lords' roup, he had bought the lands of Binny on the late Act of Parliament 1681, and that the writs and evidents of these lands were lying in the hands of Sir Alexander Gibson, clerk; and craving them up. It was answered for the Earl of Annandale, and other Creditors of Hugh Sinclair of Binny,—That, under that pretence, he might make a hundred contrivances to embezzle the charter-chest, and to abstract discharges and renunciations of rights which are extinct, and set them on foot again to seclude other creditors, &c.

The Lords granted the desire of his bill; but ordained some of the creditors to be present, that they might see what he got up, on a subscribed inventary and receipt. *Vol. I. Page 376.*

1685. *November 25.* MRS FORRESTER *against* GEORGE GOVAN.

THE case of Mrs Forrester and George Govan was reported by Drumcairn. A wife's creditors who had adjudged her jointure lands, pursuing for maills and duties, it was ALLEGED, by the husband's creditors, there could be no jointure, because, by the contract of marriage, it was only provided "at and on the receipt of the tocher;" and *ita est* the tocher is not yet received.

ANSWERED,—She was not bound for it, but her father.

REPLIED,—It was made payable to her husband and her, and if he would not do diligence for recovery of it, she might; for in sundry cases the Lords authorise the wives, where their husbands refuse concourse. DUPLIED,—That the *jus executionis et exactionis stante matrimonio* was only in the husband; and where she can act without him, is allenarly when she craves him to be inhibited as *vergens ad inopiam*, but not against third parties.

The Lords found the husband only, and not the wife, liable to do diligence for this tocher, she not being personally obliged; and therefore assoilyied from the reason of reduction.

The same was decided in *February* and *September* 1671, between *Corbet* and *Menzies*. *Vol. I. Page 377.*

1685. SIR ANDREW RAMSAY of ABBOTTSHALL *against* CHARLES WHITE.

October 15.—AT Privy Council, Sir Andrew Ramsay of Abbotshall gives in a petition, showing that one Charles White had bought £200 sterling worth of bear from him, and then fled to London, where he was pursuing him; and being now here, he craved an order to arrest him, till he should find sufficient caution to answer and pay what should be decerned against him.

The Lords seeing, by Crawfurd the counsellor's letters, that there was a process against him there, they granted warrant; and accordingly he was imprisoned. See more of this *infra*, 28th November current. *Vol. I. Page 370.*

November 28.—Abbotshall having imprisoned Charles White, as mentioned *supra*, 15th October last, by warrant of Privy Council, he steals out a decreet of *cessio bonorum*, and thereon charged the Magistrates of Edinburgh to set him at liberty. Abbotshall, being informed, suspends on thir reasons:—1*mo*, That he was imprisoned by the Secret Council's warrant, and so he should apply to them. 2*do*, The executions of his summons were false.

Then Charles gave in a bill, craving he may either be alimented, or set at liberty; or the suspension summarily discussed. Abbotshall ANSWERED,—He was content to liberate him, if he would find (if not *cautio judicatum solvi*,) at least *judicio sisti*, to abide all the diets of process, and not to fly as he has always hitherto done, both here and at London.

The Lords refused his petition; and, on this occasion, made an Act of Sederunt, which is printed, anent processes of *cessio bonorum*. *Vol. I. Page 379.*

1684 *and* 1685. JOHN THOMSON and WILLIAM LEGGAT *against* JAMES GIBB.

1684. *January* 15.—JOHN Thomson, tailor in Edinburgh, against James Gibb, maltman in Leith, reported by the Clerk-register. The Lords ordained this point to be heard in their own presence; whether one disponing lands with warrandice from his own facts and deeds, if his author's right of disposition be reduced upon minority and lesion, if the disponer will, at least, be liable to restore the price he got, and what shall be the import of such a warrandice. Craig, *Feud. lib.* 2, *Dieg.* 4, is very clear that he ought to restore the price; and there is a natural obligation upon me to recompense, *ubi res alterius apud me devenit sine causa.* See Stair's Institutions, tit. 8, Of Recompense; and Papon, in his Arrests, *lib.* 11, *tit.* 4, shows it was thus decided in the Parliament of Paris. *Vide* 28th November 1685. *Vol. I. Page* 260.

1685. *November* 28.—William Leggat, procurator before the bailies of Edinburgh, against James Gib, maltman in Leith. This was a reduction of a tack *ex capite minorennitatis et læsionis.* ANSWERED,—It was profitable.—The probation being advised this day, it was contended, though the *impensæ* were never so *utiles* or *necessariæ*, yet I, the heritor, having prohibited you to repair, you was *in mala fide* to proceed.

REPLIED,—He might proceed here *domino prohibente*, because Gib, the tacksman, had also the heritable right disponed to him by John Thomson; and though there was a reduction of it depending on the same head of minority, yet it was a title good enough to sustain his necessary reparations, aye and while it was reduced. Which the Lords found relevant; and even allowed the posterior depursements, notwithstanding they were expended after citation and the protest taken by William Leggat, because it was proven they were profitable.

The words of the interlocutor were:—The Lords having considered the tack quarrelled, with the depositions of the witnesses adduced, *hinc inde*, for either party; the accounts of the building and reparations made by Gib the defender, and approven by the curators, with the report of the tradesmen appointed to visit the work; they find there was no lesion to the minor by setting the said tack, and that the money waired out by the defender, in building and reparations, *viz.* not only the £1317 Scots first given out, but also the £326 last waired by the defender, were profitably expended for the advantage of the minor, the rent of the houses being considerably improven thereby: and therefore assoilyied from the reduction.

President Falconer having befriended James Gib in this,

William Leggat procured a stop and a new hearing, on the 19th of December and repeated his reason of reduction against the three years' prorogation of the tack, on the account of James Gib's additional expense of £326, because the minor was lesed, it not being profitable, and the defender was discharged to build these stables; and he had not the curator's warrant, as in the first depursements, and he would be much *lucratus* thereby: but the Lords refused to alter their former interlocutor. Then William insisted for reducing John Thomson's disposition, in regard a day was assigned to him to prove it was for

onerous causes, and *in rem versum* to the minor; (*vide* 15th January 1684;) and he had succumbed, and the term was circumduced against him, and the minority proven. ANSWERED,—James Gib was not concerned in this reduction, farther than that he gave John Thomson a bond for 700 merks, as the price of the lands disponed; and, seeing the land was evicted, the bond became null, *causa data causa non secuta.*

The Lords reduced the disposition, and declared the bond null; and ordained it, with a discharge, to be given up, and also the disposition to be given back.

Then William Leggat craved a visitation of the houses, to try what condition they are now in, that they may leave them in as good condition at the expiring of the tack; because they were so slightly built with cat and clay, that they would continue little longer than the space of the tack. ANSWERED,—There has been a visitation already, and this is not competent *hoc loco*, but at the end of the tack; and that all houses naturally, in process of time, are deteriorated.

The Lords found no necessity of appointing a visitation of the houses at this time; but declared the defender James Gib, at the expiring of the tack, shall be obliged to leave the houses in as good condition as other tenants use to do at their removal; but would not determine the manner thereof.

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1685. *December 2.* COMMISSARY MONRO, Petitioner.

THE Lords, on a bill, and his taking the test, re-admit Commissary Monro to be an advocate, being now pardoned for high treason and the conspiracy. This gave a general discontent to the advocates; for though the remission redintegrates, yet *nota inuritur, nec tollitur infamia, sed pœnæ tantum gratiam facit; l. 3, C. de Generali Abolit.* And the Lords should be more tender of the Faculty's reputation, by which most of themselves have risen, unless they were commanded to do it by superior powers. *Vol. I. Page 380.*

1685. *December 2.* JAMES LITHGOW *against* JAMES HAMILTON.

JAMES Lithgow, merchant, his charge on the indentures, against James Hamilton, was reported by Harcus. The Lords found, he being bound prentice to Delchamp, a Frenchman, in the art of making paper, he was not obliged to stay, Delchamp having deserted; unless James Lithgow, the charger, will offer to prove, by his oath, that he was the person who truly indented with him, having only assumed Delchamp to be his partner, and that he alone entertained him in bed, board, and clothing, and was truly his master, and that Del-

champ was made the party-contractor only to oversee his diligence and attendance. *Vol. I. Page* 381.

1685. *December* 8. MARGARET BECK and THOMAS BOOG *against* WILLIAM BECK, Factor for Edward Beck.

MARGARET Beck and Thomas Boog, her curator, pursue William Beck, as factor for Edward Beck, her uncle and tutor, to exhibit and deliver up her whole writs. ALLEGED,—1*mo*, The tutor is not called, as he ought to be. 2*do*, They cannot be delivered up till count and reckoning, seeing they are the instructions both of charge and discharge, and he must be refunded of what he has expended. 3*tio*, By the father's disposition, Edward is substituted next heir, failyieing of her, (who is blind and tender;) and therefore he has an interest to retain them, till they find sufficient caution, not only *tutorio seu curatorio nomine*, but also *ad omnes effectus*, to refund the goods and estate to the said Edward, in case she decease without heirs.

ANSWERED,—Thir defences are competent against delivery, but not against exhibition; and they cannot find caution till they have inspection; and craved he may count and reckon; and offered to prove he has as much *intus* as will pay all his expenses.

The Lords ordain William Beck, the defender, to depone and exhibit the writs called for; reserving to him and Edward, his constituent, all their lawful defences against delivery: and find there is no necessity to cite his said constituent now, because the factor has proponed peremptory defences: and ordain the curators to find sufficient caution *curatorio nomine:* and the defender to produce the account of his charges and depursements, with the instructions thereof; as also, the account of his intromissions; to the effect it may appear if there be any balance due to him; and he proving there is a balance, then allow the pursuers to prove that *intus habet* by intromission with the pupil's means and estate: and ordain all this to be proven before delivery.

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1685. *December* 12. The POOR of the WEST KIRK *against* BAIRD, DEAN, &c.

THE cause of the Poor of the West-kirk against Bailie Baird, Dean, and others, is advised: and the Lords decerned them to repay, proportionally, the 500 merks which the Kirk-session advanced out of their poor's money in 1650, to reëdify some seats in the church, then broken down by the English; reserving relief against their authors in the lands. *Vol. I. Page* 384.

1685. *December* 12. The Duke of Hamilton's Son *against* The Earl of Lithgow's Son.

Mutual bills having been given in, for sequestrating the rents of the estate of Callander, during the dependance of the plea betwixt Duke Hamilton's Son and the Earl of Lithgow's Son; the Lords nominated John Keirie of Gogar to uplift the same, *medio tempore*. *Vol. I. Page* 384.

1685. The Town of Edinburgh *against* The Town Clerks.

November 28.—Patrick Sime, clerk of the Cannongate, dying, a competition arose between the Town Council of Edinburgh, pretending they had the right to put in another clerk, and that their clerks had resigned this; and Mr John Richardson and John Drummond, the Town-clerks, alleging it was a perquisite of their office, and that they had been in the use and possession of placing clerks and deputes there. *Vide* more, 12th December 1685.

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December 12.—A question having arisen betwixt the Magistrates of Edinburgh and their Clerks, anent the clerkship of the Cannongate, as mentioned 28th November 1685; and the Magistrates having commanded their two clerks to produce their right to the office, if it extended to the Cannongate; they in the mean time give a commission and deputation to Mr William Syme, brother to Patrick, who formerly enjoyed it a short time, though he gave a good sum for it; and he thereon raised an advocation of the affair from the Town Council; who taking this for an affront, they convene their clerks, and, with the concourse of the king's advocate as their assessor, suspended them from their place, on thir grounds of malversation, That they had given a deputation while the Magistrates were taking cognition of their right; and that they, at least Mr William Syme, their depute, had declined the Magistrates' jurisdiction by the advocation. What emboldened the Provost the more to proceed thus summarily, was a recommendation from Secretary Melfort to put Cathcart of Carbiston, Sir James Rocheid's son-in-law, into that place, which he had formerly possessed, and was turned out. The Town Council, during the suspension, authorised Alexander Gray to subscribe and officiate; and they required them by way of instrument to deliver up the keys of the charter-chest. The clerks, to get themselves reponed, did offer humble submissions; but it was required that they and Mr William Syme should pass from their claim, (though his brother had got little for his money,) to the Cannongate clerkship; and on the 18th of December they are reponed to their place, but required to submit. The king's advocate gave his opinion, that Carbiston might be summarily reponed; but Sir George Lockhart said, their gift could not be quarelled but in a reduction. And accordingly they summarily repossessed Carbiston to the clerkship of the Cannongate.

The clerks of Edinburgh were, soon after this, turned out; and Sir James Rocheid reponed, as mentioned *infra*, 22d January 1686.

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1685. *December* 17. BORTHWICK'S WIFE *against* HER HUSBAND.

DOCTOR Borthwick's wife having obtained an aliment from him *ob ejus sævitiam*, he presents a bill of suspension, that the modification was more than his small fortune could allow; which seems a very rational defence.

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1685. *December* 18. JOHN FLEMING *against* WILLIAM BECK.

JOHN Fleming, baxter, pursues William Beck, merchant, in a reduction *ex capite inhibitionis*. ALLEGED,—The ground of the debt whereon the inhibition was served, is paid; in so far as he arrested the maills and duties of the debtor's lands, and took a decreet for making forthcoming, and so must count for the whole, even as a compriser entering once into possession is bound to count for the whole, and to do diligence, or else show an impediment that hindered him; as was found 14*th January* 1681, *Shaw* against *Muire*.

The Lords, on Tarbet's report, repelled the defence on the decreet of making forthcoming obtained by the pursuer, unless the defender will allege that he actually intromitted; but ordained the pursuer to grant assignation to that decreet, in respect of his offer to do the same. *Vol. I. Page* 386.

1685. *December* 19. The DUCHESS of LAUDERDALE *against* SIR WILLIAM SHARP of STONYHILL.

THE Duchess of Lauderdale gives in a bill against Sir William Sharp of Stonyhill, in regard of his sickness, craving he might be examined anent the having sundry papers belonging to the deceased Duke of Lauderdale, her husband, and consequently to her as deriving right from him, relating to the lands he had disponed to her, or to that apprising of Anderson of Hills, with which this Earl of Lauderdale clothed himself against the Duchess, that she might try if it was paid or not; and my Lord Kemnay was appointed to go and examine him.

Before advising his oath, Sir William Sharp died; but the Lords, on the Duchess's application, on the 29th January 1686, granted a sequestration of all

Sir William's cabinets and papers, that the writs relating to her right from her husband might be inspected. *Vol. I. Page* 386.

1685. *December* 22.

JOHN Cuthbert having been examined on a commission obtained by Elizabeth Frazer and Hugh Monro of Taninich, her husband, for exhibition of writs: and it being represented, by a bill, that at the examining they would not give the pursuer access; *2do*, That their oaths want these formal and solemn words, "As they shall answer to God:"

Lord Carse, to whom the consideration of the bill was referred, annulled the report, on the want of these words, and granted a new one.

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1685. *December* 23. ARCHIBALD LAW *against* JOHN BALLANTYNE.

THE case of Archibald Law, writer, and John Ballantyne, door-keeper to the advocates, was reported by Carse. This was a competition betwixt Law as assignee, and Ballantyne an arrester and inhibiter. They eluded the arrestment, because infeftment had followed on the debt arrested; and, for the inhibition, though it was prior to Law's assignation, yet he offered to prove there was a prior assignation from William Brown of Stevenson, which was given back, and this was taken from John Adam his trustee; and so it must be drawn back *ad suam causam*, and reputed in implement of the first assignation. ANSWERED,—That cannot be, for the first was absolutely passed from and extinct; and no law can make a resurrection of it. *Quod semel extinctum est reviviscere nequit, et quod nullum est nullum debet sortiri effectum.*—If it had been casually lost, there had been some ground to recur, but not where it was deliberately cancelled. REPLIED,—It was only then laid aside as unnecessary.

The Lords found, that its tenor might be made up *ad hunc effectum*, for proving that there was a prior back-bond and assignation before the arrestment and inhibition, providing there was no fraud in concealing it, for disappointing William Brown's other creditors; and remitted to my Lord Carse, reporter, to inquire anent the reason of cancelling these writs, and to do therein as he shall find cause.

This being reported again on the 28th January 1686, the Lords found the former assignation has been cancelled *animo fraudandi* of William Brown's creditors; and therefore reversed their former interlocutor allowing the tenor of it to be proven; and simply preferred Ballantyne's right to Law's.

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1685 *and* 1686. Sir John Ramsay of Whitehill and Anna Carstairs *against* Carstairs of Kinneuchar.

1685. *November* 24.—The case of Sir John Ramsay of Whitehill and Anna Carstairs, his spouse, against Carstairs of Kinneuchar, was debated *in præsentia* and decided. The Lords considering that, by the decreet 1664, the aliment is constituted to the mother and daughter indefinitely, (without declaring their shares,) and that it is thereby appointed that the wife's infeftment shall be as effectual for the said aliment as for her jointure in case her husband were dead, (he being furious;) they found the mother could not restrict the aliment in prejudice of her daughter, after her marriage, by her contract of restriction, but that the pursuers have right to 700 merks, as the equal half of 1400 merks, for all years after the marriage; and sustained the defence, that the mother did aliment the daughter, and likewise the allegeance, that the daughter, pursuer, is executrix to her mother, and so is liable to warrant the transaction made by her in so far as the executry goods extend: and also sustained the allegeance, that Sir John Ramsay has homologated the said contract by his discharge: and assigned a day for proving. And the discharge being produced, and advised by the Lords on the 16th of December, they found the pursuers had homologated the contract of restriction by granting that discharge; and therefore assoilyied the defender from any superplus aliment acclaimed more than is contained in the contract of restriction. *Vide* more, 2d January 1686.

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1686. *January* 2.—Sir John Ramsay gave in a bill reclaiming against the interlocutor *supra*, 24th November 1685, alleging that he and his Lady had only discharged what was due to her as executrix to her mother, but not the half of the annuity due to her *jure proprio*, and so had not homologated the contract of restriction.

The Lords refused the desire of this bill. The President was clear; though he had been Sir John Ramsay's advocate in this same cause, and gave him hopes that he might gain it.

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1686. *January* 5. Dick of Grange *against* Murray of Skirling.

The case of Dick of Grange and Murray of Skirling was heard in presence. There being a wadset of some lands affected with a back-tack, under an irritancy that it should expire if two terms run in the third unpaid; Grange's mother, to prevent this, paid the back-tack duty, and before her death assigned this to her son. Afterwards the three terms' failyie being like to be incurred; Grange offering to pay it, Skirling alleged he had no interest. Answered,—1*mo*, Any may purge an irritancy. 2*do*, He had an interest; for, if he did it not, he would lose the money formerly paid out by his mother.

The Lords found he had interest. Then Skirling offered to redeem from Grange. The Lords found it was more reasonable and just that Grange should be preferred, and therefore allowed him to purge the failyie; and repelled Skirling's offer of paying him. *Vol. I. Page* 389.

1686. *January* 7. Doctor Sinclair *against* Sir James Cockburn and Lord Sinclair.

The case of Doctor Sinclair against Sir James Cockburn and Lord Sinclair was reported by Carse. The first point was: the Doctor having got a bond of provision from his brother Hermiston, this Lord Sinclair's father, for 2500 merks; when he is abroad he draws a precept for 500 merks on Sir James Cockburn, payable to —— on his discharge; which presupposes that there were effects in Sir James's hands, whereas there were none but only a part of the Lady Hermiston's annuity, to the arrears whereof the Doctor has since got right. And Sir James contending that this was *indebite solutum*, and no specific discharge of it; the Lords found, seeing the Doctor had granted some posterior discharges, though they were general, yet they satisfied the quality of the precept. Then Sir James offered to prove, by the Doctor's oath, that this was never allowed him; which was found relevant.

The second point was, Sir James remitted 1100 merks to the Doctor in France, upon bills of exchange: when the Doctor comes home, he counts with Lord Sinclair, his nephew, and gets a bond from him (without discounting the sums paid by Sir James,) for 5000 merks, being both his portion and the bygones of his mother's jointure. When Sir James comes to count with his son-in-law Lord Sinclair, and gives up thir articles paid to the Doctor, my Lord refuses to allow them: whereon Sir James raised an action against the Doctor for repayment; and the Lords assoilyied the Doctor, upon this ground, that it is presumed thir prior payments were all discounted at the time of the posterior new bond. Sir James Cockburn gave in a bill against this, that the presumption cannot hold unless he prove that Lord Sinclair knew of thir partial payments at the time he granted the Doctor this new bond: which seems reasonable; for, if they did not consist with his knowledge, how could he default them. *Vol. I. Page* 389.

1686. *January* 8. The Sheriff-Deputes of Edinburgh *against* Hutchison.

The two Sheriff-deputes of Edinburgh put in a query to the Lords anent a retour of quinquennial possession of one Hutchison in Newbottle, a traitor, who had been at Bothwell-bridge, whether the calculation of the rebel's five years' possession must be of five years immediately preceding the doom of forfeiture, as the 2d Act 1584 seems to require, or if it must be five years before

the Act of adjournal denouncing him fugitive, some years before the forfeiture; for they could not prove he was five years in possession before the forfeiture.

The Lords ordained them to take trial of his five years' possession preceding his being fugitive; because his tenant's possession was reputed to be his possession, and though his tenant had apprised it, yet he could not invert it.

But what if a rebel fly and desert the possession on his committing the crime? Then the quinquennial retour behoved to be from the perpetration of the fact backward. *Vol. I. Page* 390.

1686. *January* 13. Lady Kirkland and John Robertson *against* Kirkland's Heir.

Euphame Seton, Lady Kirkland, and John Robertson her husband, gave in a bill, showing that her first husband was bound to infeft her in the liferent of 20,000 merks; and that, having that sum secured on her father's lands of St Germains, he had put her name in it; but she had not accepted of it, because the Earl of Winton, superior, had a depending reduction and declarator that the lands held ward, and likewise that the charter bore a *pactum de non alienando*, and that St Germains had granted many base infeftments, whereby both the legal and conventional recognition were inferred; and therefore craved the Lords would either ordain Kirkland's heir to infeft her in warrandice of that infeftment on St Germains, in case the Earl prevailed, or else that her uplifting her annualrent and jointure out of St Germains shall no ways import her acceptation of that infeftment out of St Germains to be in satisfaction of the obligement in her contract of marriage.

The Lords having considered this petition, they declared that the petitioner, till the event of the process betwixt St Germains' creditors and the Earl of Winton, may uplift her annualrents out of the lands of St Germains; and that the same shall not import her homologation of that infeftment in these lands, as if she accepted it in satisfaction of her husband's obligement to her in her contract of marriage, so as to prejudge her recourse against Kirkland, in case Winton prevail; and remitted the rest of the affair between her and her son to Kemnay, who heard the cause. *Vol. I. Page* 391.

1686. *January* 19. The Lady Nairn *against* George Nairn.

The Lady Nairn pursuing George Nairn, the late Lord Nairn's servant and chamberlain, for count and reckoning of nine years' rent of his lands; he defended himself with partial discharges, and a total one except for half a year; whereupon he was assoilyied from all proceedings. But she alleging that she only craved inspection of his accounts of charge and discharge, in regard there were several persons craving money for furnishings in my Lord Nairn's time, and which she believes were paid by George, and will appear from a sight of his accounts; and he having fraudulently put them out of his hands since the communing between the tutors and him, and a little before the citation given him in the exhibition;—the Lords ordained him to depone where they were, and to exhibit. *Vol. I. Page* 394.

1686. *January* 21. The EARL of SOUTHESK *against* MURRAY of PHILIPHAUGH.

THE Earl of Southesk pursuing an adjudication against Murray of Philiphaugh, the debtor offers to restrict him to a parcel of land; and the rental being admitted to probation, Southesk referred it to Philiphaugh's oath. ALLEGED,—He is not obliged to swear; because, when another creditor comes to adjudge, he may deduce another probation, *viz.* by the tenants and witnesses, and, if they should differ, it may reflect upon his oath. ANSWERED,—This can infer no more hazard of perjury than if one creditor should refer the passive titles to a debtor's apparent heir's oath, and another should prove it *aliunde*.

The Lords, on Forret's report, found, if one were adjudging the whole, the debtor is not bound to depone, because there on the subject the other creditors would have interest; but where one adjudges only a part, there they found that it might be referred to his oath. *Vol. I. Page* 394.

1686. *January* 22. SIR JAMES ROCHEID *against* The TOWN of EDINBURGH.

SIR James Rocheid produced, to the Town-Council of Edinburgh, the petition he had given in to his Majesty, showing he was illegally dispossessed of his place as clerk of Edinburgh; and that, when he craved entrance at the Town-Council door, to propone his defences, he was kept out, as mentioned 17th December 1684; with the King's deliverance thereon, remitting him to the Town-Council of Edinburgh to repone him, if they find, after hearing all parties, that he was illegally deprived; and declaring that, in this case, and in all time coming, the Magistrates and Town-Council shall be sole judges to their clerks; and discharging the Session or Privy-Council to meddle therewith. This was to hinder advocations or suspension of their proceedings. On this, the Town-Council suspend their two clerks, and ordain all to debate before them who have best right; and, in the mean time, Alexander Gay, depute, is appointed to officiate.

On the 29th of January, the Town-Council went through the particular grounds of Sir James Rocheid's deprivation; and such of them as they judged relevant were admitted to Mr John Richardson's probation: but he knowing they intended him no fair play, he neither made appearance nor opposition: so it was found, that Sir James was deprived without probation of a fault; and, on this sort of probation of his innocence, on the 5th of February they reponed him, and consequently James Hamilton, to their office of clerk; but they resolved to make it only *durante beneplacito*.

The removal of appellation was scrupled at; seeing Sir James himself had provoked to judgment, by raising a reduction before the Lords. But he may pass from it.

Yet an inferior court cannot reduce and annul their own decreet passed upon probation; which belongs to the Session only. *Vol. I. Page* 397.

1686. *January* 28. The Earl of Mar *against* Brown.

The Earl of Mar pursuing one Brown a wadsetter, on the 62d Act of Parliament 1661, for the superplus duties more than paid the annualrent of his wadset money, he craved deduction for some waste lands. It was answered,—That no respect could be had to that article of defalcation, which might have proceeded from his own negligence in not labouring the ground which he found in tenandry at his entry; unless he say the devastation was by some public calamity of war, as at the English invasion in 1650, or by famine or pestilence.—The Lords referred it to an auditor. *Vol. I. Page* 397.

1686. *January* 28. Sir Walter Seton *against* Sir James Cockburn.

See the prior part of the report of this case, Dictionary, page 11,385.

The case between Sir Walter Seton and Sir James Cockburn being advised; the Lords ordained John Coupar, who was then their servant, to be examined on the having of the count books and instructions, and to exhibit and produce the same upon oath, that Sir Walter may have inspection; which lays open Sir James's accounts to a review. *Vol. I. Page* 398.

1686. *January* 29. Robert Cleland *against* Andrew Irvine.

In the action, Robert Cleland against Andrew Irvine, my Lord Carse rejected the intimation of an assignation as null; because intimated only at Andrew's shop, he not being there himself; which was alleged to be a place where a merchant is more commonly to be found than in his house. But he objected a decision, within these 12 months, between John Davidson and Mr Archibald Nisbet, writer to the Signet, where the execution of a summons was annulled, because only left at Mr Archibald's writing chamber. But this proceeds on Queen Mary's Act of Parliament 1555, which precisely requires citations on summonses to be either at their dwelling-houses or personally; but there is no such Act with respect to intimations of assignations, except it be drawn *a paritate.* *Vol. I. Page* 399.

1686. *February* 4. James Cleland *against* Sandilands and Henderson.

In the case between James Cleland, merchant in Edinburgh, and Sandilands and Henderson; the Lords, on Saline's report, preferred Cleland to the sums arrested in Sandilands' hands, and whereon the decreet charged upon was obtained, in so far as there is resting to him of his bygone annualrents; unless Henderson, the factor, (who pretended he had the only right to uplift the victual, and price of it, and that the creditors were only to pursue him for it, and not to arrest,) will say and instruct, that he is exhausted by Brugh, and other preferable creditors, their annualrents. *Vol. I. Page* 400.

1686. *February 5.* LORD BARGENIE *against* SIR JOHN DALRYMPLE.

IN my Lord Bargenie's case with Sir John Dalrymple, anent the price of Castle-Kennedy; the Lords found, that Bargenie's two receipts, extending to 1400 merks, were not to be presumed to have been allowed or discounted to Sir John out of the fore-end of the price of Castle-Kennedy bought by him from Bargenie; though there had been two or three countings betwixt them, posterior to the dates of these tickets, and new bonds granted; because they were yet in Sir John's hands unretired, and they would not have been left there if they had been discounted. *Vol. I. Page* 401.

1686. *February* 6. PATRICK LYON *against* JOHN STRACHAN.

JOHN Strachan, writer to the Signet, having reflected on my Lord Forret, as if he had not done him justice in a cause depending before him, against one Pearson; as also, in bills and informations to the Lords, having reflected on Mr Patrick Lyon, advocate; there is a complaint of defamation given in against him, for saying that Mr Patrick attempted to assassinate him; and nothing being so dear to an advocate as his reputation, next to his conscience, he craved he might either prove it, or else be punished for the slander.

The Lords finding the injury proven *scripto*, and that he declared there were no witnesses present when Mr Patrick threatened him, they sent him to prison, to lie there till they should consider what further punishment to inflict on him. And, if he had not submitted and craved pardon, they were resolved to deprive him: however, he was liberated on a sharp rebuke.

Vol. I. Page 401.

1685 *and* 1686. SIR ALEXANDER HOME of RENTON *against* SIR PATRICK HOME, his Brother.

1685. *November* 21.—SIR Alexander Home of Renton pursues Sir Patrick Home, his brother, for count and reckoning of what debts he has defrayed by the tack set to him by their father, for paying those debts, and yet they were as great now as at the father's death. And the rental of the lands being admitted to Sir Alexander's probation, he had got some to swear on a very great rental, 3000 merks by year more than it was set at or paid, the time of his father's death. Sir Patrick mainly OBJECTED against one Dickson, who, in 1677, being examined, had deponed he knew not the rent; but, in 1683, being re-examined, is very clear on every article: and he urged sundry contradictions in the two oaths to infer him perjured, and that *standum est priori examini* in this competition, there being *jus quæsitum* to Sir Patrick by it; and that many famous lawyers thought neither of the two oaths ought to be credited; *l.* 16 *D. de testibus.*

ANSWERED,—He might remember more in 1683 than in 1677, (yet the one is recenter than the other,) and he might be more fully examined the last time. *2do*, Many deponed on a rental twenty or thirty years ago, which could not in-

struct what it was at Lord Renton's death, thirteen or fourteen years since. *Stio*, They depone not what a roum does pay, but what it might, if it were well stocked and laboured; which can be no rule for a master: because a tenant must have his own profit and benefit (over and above what he pays to his master) to live on, otherwise he could not keep it.

Yet the President said, such witnesses were to be understood thus, that they meant the roum could pay so much *deductis deducendis*, and allowing to the tenant his due.

The Lords inclined to reject Dickson's testimony; but,—finding that the rental on which Sir Alexander's witnesses deponed, was, by negligence, neither subscribed by the Lord, clerk, nor witnesses, and that there had been a rental made after Renton's death, by Lanton and Sir Hary Home, chosen by both,—they ordained it to be produced; and recommended, in the mean time, to some of their number to settle the parties if they could. *Vol. I. Page* 376.

1686. *February* 9.—Sir Alexander Home of Renton gave in a bill against Sir Patrick, his brother, complaining that he had caused loose out sundry sheets in an act of litiscontestation betwixt them, and insert new sheets therein with alterations. This being a forgery of a high nature against an advocate, Sir Patrick gave in a counter-bill, craving it might be tried, for his vindication, and the drawer of the bill censured. *Vol. I. Page* 401.

1686. *February* 11. RAMSAY *against* BILL.

THE case of Ramsay and Bill being reported by Castlehill, the Lords found, That the disposition in favours of the defender, was of all the Lady Granton's goods, except what was legated, and that the relation to an inventary was not taxative but demonstrative; and therefore sustained the disposition, and assoilyied from Bill's reduction: in regard, by the other disposition, she left a legacy to her brother Henry Bill, and declared if he did not accept of it in full of all, then it was to accresce to Major Ramsay; by which it was clear she intended her brother no more but that legacy. And that her disponing to Major Ramsay all her moveables, conform to an inventary, does not restrict it to the goods allenarly contained in that inventary, and no more, is evident; no more than this legacy, *omnia mea bona et supellectilia domûs meæ do, lego*, is taxative; for the words *domûs meæ* were found by the Senate of Naples not to restrict. See Matthæus *de Afflict. decis.* 106. *Quær.* if this disposition, mentioning only goods and gear, should extend to sums of money; which some think *negative*.

Vol. I. Page 401.

1686. *February* 11. ALEXANDER BUCHAN *against* THOMAS YOUNG.

THE case of Alexander Buchan, vintner, against Thomas Young, merchant, was reported by Castlehill; and the Lords found, that Thomas Young had not taken the assignation to Gordon and Bisset's bond in satisfaction, but only as an accessory security; because the words of his acceptation of them were, "when paid." See Dury, *29th March* 1626, *King*. But found Thomson's

charging and denouncing Buchan unwarrantable, he having scored his name out of the decreet; and therefore ordained Thomas Young, on his own charges, to relax Alexander Buchan, and to obtain him the gift of his own escheat.
Vol. I. Page 402.

1686. *February* 11. COLIN LAUDER *against* JANET TROTTER.

JANET Trotter, relict of one Brisbane, being incarcerated by Colin Lauder for a debt; upon Redford's report she was liberated, on an intimation made to him in terms of the Act of Sederunt 1675, and presenting a bill of suspension, and offering upon oath to consign a disposition of her means. So, if this course hold, there need no more decreets of *cessio bonorum*; for this is a far more summary way. *Vol. I. Page 402.*

1686. *February* 12. ANENT TRANSFERANCE.

The Lords, on Kemnay's report, found a summons of transferring could not be summarily called like an Act, but behoved to be seen and returned, but needed not then abide the course of the roll. *Vol. I. Page 402.*

1686. *February* 13. CALDERWOOD of PITTEDY *against* BELCHES of TOFTS.

THE Lords reponed Calderwood of Pittedy in his action against Belches of Tofts, to all his defences against that decreet of reduction of his author's right, because he had then a comprising, and was not called to that decreet.
Vol. I. Page 403.

1682 *and* 1686. SIR ROGER HOGG, Lord Harcous, *against* LORD PITSLIGO; or LORD PITSLIGO *against* ROBERT and ALEXANDER MILN.

1682. *March* 24.—THE Lords, on Saline's report, found a comprising, led by a conjunct fiar or liferenter, not only for his liferent use, but also for the very stock and fee of the money, to which he had no right, accresced and belonged to the fiar of the sum, and was a valid comprising, and subsisted *quoad* both.

Though it was objected that the fiar's name was not in all the comprising, nor had he given either factory or assignation; and it was not led at his instance; and though it was an heritable sum bearing annualrent, being before the Act of Parliament 1641, made anent such sums; and yet was not first rendered moveable by a charge. *Vol. I. Page 180.*

See the intermediate parts of Fountainhall's Report of this case in the Dictionary, page 6,040, *et seq.* under the names, *Pitsligo* against *Hilstone and Hog.*

1686. *February* 17.—The Lords bestow the whole afternoon in advising the mutual probation led by the Lords Pitsligo and Harcous, Robert and Alexander Milns, and Keith of Ludquhairn, mentioned 5th March 1684. The Lords ordained the clerk to draw out a scheme of the probation of the rental adduced by both parties, that they might make up one betwixt the two. And found that it was not proven that Sir Archibald Primrose, one of Pitsligo's authors in his comprising, possessed Blackhouse, &c.: seeing the witnesses only deponed on hearsay, that one bruiked by a factory from him. And found his entry to the possession was in 1653; and that the Town of Aberdeen, another of his authors, possessed three years before that; but sustained this allegeance to elide it, That they were debarred *manu forti* by old Ludquhairn. And found his reparations necessary; but desired to be cleared if they were before or after the legal expired. And inclined to find, that Pitsligo should count for the two roums of Torhendry and Bogend, because he set a tack thereof; though he says the common debtor violently possessed them. And he farther alleged, that the lands were racked at his entry, and he convened all the neighbouring tenants, and consulted with them how he might keep up the rent; and that all Miln's witnesses were but obscure, beggarly fellows.

Lord Carse having prepared, and reported the probation, on the 23d of March; the Lords found the Town of Aberdeen did enter to the possession of the crop 1652; and allowed both parties a diligence for 48 hours, (for Pitsligo craved it in common form, and the Lords gave it only against those within Edinburgh,) to prove whether the common debtor was brother or nephew to Keith of Balmuire, the disponer of the tacks. And find that the disposition, notwithstanding of the objections and nullities alleged, does convey the right to Ludquhairn. And find it proven, that Sir Archibald Primrose did enter to the possession, and lifted the rents of the crop 1657. And find, by the tack and disposition produced, that Pitsligo did set a tack of the lands of Torhendry and Bogend for the crop 1653, and must count therefore and since syne. And find, there being no intimation made to the heritor to set his land, by Pitsligo, he cannot crave allowance for the article of waste lands. And they modify the sum expended on the reparations to 2000 merks, to be paid out of the superplus intromissions, but not to hinder the extinguishing of the comprising within the legal. And find the rental of Boddom and Blackhouse is proven to be £392 Scots, 12 chalders 12 bolls bear, 5 chalders 12 bolls oats, and 8 wedders; and the rent of each roum of the lands of Ludquhairn, &c., conform to the report of Ludquhairn's commission and witnesses adduced by him: without respect to Pitsligo's probation, or his objections against their witnesses. So it makes the rental 8 chalders of victual above what the lands can now pay.

Conform to this interlocutor, Ludquhairn adduced witnesses for proving that old Sir William Keith was nephew to Balmuire.

The Lords allowed Pitsligo no chamberlain fees, nor regarded old Sir William Keith's possessing Bogend and Torhendry till his death, though proven and acknowledged. *Vol. I. Page* 404.

Thereafter Pitsligo gave in a petition, craving that the Lords would have respect to what he offered for freeing him of the rents of Boddom and Black-

hosue, *viz.* he offered to prove, that these lands were not the common debtor's the time of leading of any of the apprisings against his estate; and also for freeing him from Torhendry and Bogend: and siclike for allowing Pitsligo a new diligence for proving Ludquhairn's bangistry, whereby the Town of Aberdeen were debarred from the rents of Torhendry and Bogend, several years after their entry to the possession of the same; as also for proving sundry other articles.

The Lords, on the 27th of March, having heard this petition and answers, they refused to grant any commission, or further term, but decerned; and remitted to Carse, to whom the calcul is referred, to consider what shall be produced by the petitioner before extracting, for further instructing his defalcations; and to allow the same.

Pitsligo complained, that the Lords had decerned, (only it was the end of a Session,) before an auditor was nominated, and before any of the parties had given in their accounts, that objections might be made against the same, and before Pitsligo could have time to instruct or produce anent his defalcations; and therefore he gave in another bill, craving the Lords would allow him to be heard before an auditor, whom he desired they would appoint; and, seeing nothing was remitted to my Lord Carse, but the adjusting of the calcul, that they would remit the whole matter to him, with power to receive what documents Pitsligo should produce, and to hear and determine thereanent.

The Lords, on the last of March, referred to Carse to adjust the accounts and calcul, when he orders the extracting the decreet. *Vol. I. Page 404.*

1686. *February* 19. Sir Thomas Burnet of Leys *against* Sir Peter Fraser of Doors.

In the action for payment, pursued by Sir Thomas Burnet of Leys, against Sir Peter Fraser of Doors, upon Dr Fraser's bond, as executor to Doctor Reid, for the use of his legatars; Kemnay having refused a diligence, the Lords, on Sir Peter's bill, ordained him and Dr Andrew Fraser of Kinmundy to condescend on the writs, and to give their oaths of calumny if they had the writs they craved, in town, or in whose custody they were; and if they deponed *negative*, or if Leys could not produce or supply them, then they granted a diligence.

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1686. *February* 19. The King *against* Murray of Livingston, Lord Torphichen, and Elies of Elieston.

The King's reduction against Murray of Livingston, the Lord Torphichen, Mr John Elies, and other heritors adjacent to Drumshorlan-muir, was reported by Pitmedden; and the Lords find not only those heritors whose charters bear the muir of Drumshorlan *per expressum*, but even those which only carry the common clause, *cum communi pastura*, have a right of servitude on it, if they

can prove prescription by forty years' possession; though it was alleged to be imprescriptible, as a part of the King's patrimony, though unannexed.

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1685 *and* 1686. The COLLEGE of PHYSICIANS of EDINBURGH *against* GEORGE STIRLING, an Apothecary.

1685. *March 25 and 26.*—DOCTOR Cranstone, as procurator-fiscal to the College of Physicians of Edinburgh, having pursued George Stirling, apothecary, before their court, for incroaching on the practice of medicine in curing a young man; and on his not appearing, having holden him as confessed, they fined him in L.5 sterling. This being suspended, his special reasons were, 1*mo*, That he had not contravened the patent, nor practised in medicine; for all he did to the young student, son to Johnston of Gratnay, was to give him a clyster, and to let blood, which are manual operations. Yet the physicians ALLEGED, the using of these was very dangerous to the people, if mistaken or wrong applied;—so they would put a necessity on us to call them on all occasions. 2*do*, That it arose from an external cause, *viz.* a strain in playing at the bullets, as the boy declared, and so this cure by their patent did not concern the physicians; diseases arising originally from internal causes only, being made the proper and privative subject of their calling.—But it is very difficult to conjecture, from symptoms, whence the true and real cause is. 3*tio*, That he was a stranger, and no burgess; and their College should not extend to such. 4*to*, That it was in a case of extraordinary necessity and haste, *et qui non patiebatur moram.* 5*to*, That he got nothing for his pains; and so acts of charity cannot be censured. 6*to*, That within twenty-four hours he sent for physicians to him.

The general defences against the decreet were, that it was null; in respect it held him as confessed when he was not personally warned to the diet *pro confesso*,—though he was personally warned to a former diet. 2*do*, They clandestinely took a precognition, (which is only competent to the Privy Council, as *officii nobilioris*, and that not without a warrant from his Majesty;) and finding that did not prove, they suppressed it, and referred the libel to his oath. 3*tio*, The decreet bears no interlocutor finding the libel relevant, as it ought to do;—though the referring it to oath *tacite* includes that. 4*to*, They are expressly bound up by their patent not to proceed to the fining of any chirurgeon-apothecary of Edinburgh, unless one of the Magistrates be present with them, and without whose consent it shall not be leisome to fine them. And whereas it is pretended they warned the Magistrates to come:—1*mo*, It was at an unseasonable time, when they were attending the Circuit. 2*do*, They did not call them to the first Court, whereas they ought *in omnibus actibus judicialibus assidere*, and not be called merely as ciphers to the last act of fining and sentence. 3*tio*, The Magistrates refused; because Sir Robert Sibbald, the Preses of the Physicians, declared he would not let them preside, (which is their privilege in all such Courts within

Edinburgh,) yea he would not allow them a vote, contrary to their own patent. *5to*, They had unwarrantably directed precepts of poinding on their own decreet; whereas their gift of erection gives them only *notio* or *audientia*, like the *judices pedanei et episcopi* in the civil law; but ordains the Magistrates of Edinburgh, and other ordinary Judges, *impertiri suum officium, iisque commodare brachium suum seculare cum ab iis imploratur*, (as the Doctors call it,) by executing their decreets, and directing such precepts and executorials thereon as they do upon their own.

This cause being reported by the Lord Drumcairn; the Lords found, where the Magistrates of Edinburgh are required by the College of Physicians to concur, and refused, that then both the judicative and the executive power against the chirurgeons and chirurgeon-apothecaries belongs to the College; but in regard it appears, by the instrument produced, that the Magistrates were only required to assist and concur at the meeting of the College that same day of the instrument, the Lords turn the decreet into a libel, and remit the cause to the College, with this quality, that in time coming the College give timely intimation to the Magistrates when they require their concourse, being 48 hours at least preceding their meeting.

This seemed strange, when the physicians had committed iniquity, yet to remit it back to them, not being in an advocation, but a suspension.

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1686. *February 2.*—The case between the Royal College of Physicians in Edinburgh, and George Stirling, chirurgeon apothecary, mentioned 26th March 1685, was debated; wherein the Town of Edinburgh compeared and claimed, *1mo*, The presidentship in the meeting; *2do*, A negative in judging the chirurgeon-apothecaries, their burgesses. It was represented against the physicians, that power was inebriating, and therefore thir gentlemen, though very worthy persons, are ready to abuse it, not being accustomed to it; and it may degenerate the sooner into oppression and tyranny, that they are concerned; therefore their power was limited: *1mo*, The Lothians were all cut off. *2do*, The Universities are reserved. *3tio*, The Town of Edinburgh; and, *4to*, The chirurgeon-apothecaries. So that their patent is like those rules whereof there are *plures exceptiones quam exempla;* and what is left them is mainly to regulate their own delinquencies. *2do*, Albeit the magistrate sits with the minister in the kirk-session, yet he takes place of the minister, although he be only his concurring assister; and the minister presides. In such a concourse, the oldest jurisdiction, the largest and the most honourable, must have the precedency. *3tio*, The Magistrates have more dignities, *viz.* of being sheriffs, justices of peace, &c. whereas the physicians have but one; and the physicians are but *judices pedanei*, having only *notio et audientia*, and limited power, being restricted to a sum, and to call the Magistrates, and to use and implore their *brachium* for putting their decreets in execution: and this threefold cord of the Town's preference, so strongly twisted, ought not to be easily broken. *4to*, The Town are sheriffs a hundred years for every year the Doctors are a College, it being only three or four years since their erection. *5to*, The Town, in a competition betwixt them and the College of Justice, about the precedency in the electing a Regent of Humanity in the College of Edinburgh, got a letter from the King, in 1667, by Sir Andrew Ramsay then their provost's

procurement, determining their provost should have the same place and precedency within the Town precincts, that was due to the mayors of London or Dublin, and that no other provost should be called Lord Provost but he: and now the Mayor of London, when he is in the King's-bench, presides before the Chief Justice: so it does not hinder his precedency that he is not versant in the subject-matter; for the College of Justice understood Greek and Latin, to choose a regent, better than the provost did; and yet he presided.

The President drew it to this question, Which was the principal jurisdiction, and which the accessory? Whether the principal was lodged in the Physicians, seeing they called the meeting, and it was anent a subject of their trade; or in the Town, who had the first, the amplest and oldest jurisdiction, and were ordained to execute their sentences, and to direct precepts thereupon? And the Lords having advised the debate, they found, That, by the patent granted to the College of Physicians, the Magistrates of Edinburgh have not a negative; but that the College may proceed, albeit the Magistrates be not present, or, being present, do not concur, intimation having been made to them to be present: and this notwithstanding that clause of the patent, that it shall not be lawful for them to fine a chirurgeon-apothecary of Edinburgh, without the consent of one of the Magistrates of Edinburgh, who shall be present *et assidebit*: and found, That the right of precedency does belong to the College of Physicians, and not to the Magistrates, albeit the procedure be against chirurgeon-apothecaries, burgesses of Edinburgh.

The Lords were also thinking for redding of marches, to decide thir points: 1*mo*, That, for diseases not originally internal, (as their patent distinguishes,) a chirurgeon-apothecary might, without a physician, undertake the cure thereof, where it arose from an external cause, and was not yet come to be a formed and stated disease. 2*do*, Where they are bound to call a physician, if the requisition of one be sufficient, or in case he come not, if they be obliged to call another, and so go through them all. 3*tio*, What they shall do in case of patients who absolutely refuse to call a physician, either through poverty or a natural aversion. 4*to*, What shall be the chirurgeon-apothecary's carriage, if it be only a work of charity, or necessity; must he stand an idle spectator till a physician come?

The Chancellor said, baptism, in the case of necessity, might be administered by any; and the King's Advocate seeming to despise the simile, the Chancellor took it very hot as a contempt. *Vide* 19th February 1686.

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1686. *February* 19.—The case of the Physicians of Edinburgh, against George Stirling, mentioned 2d February current, being reported by Edmonston; the Lords remit the cause back again to the College of Physicians; though it was not in an advocation, but a suspension of a decreet; because the Lords thought physicians would understand to judge delinquencies in physic better than they. *Vol. I. Page* 406.

See Edinburgh Chirurgeons against The Apothecaries, in the Index to the Decisions.

1685 *and* 1686. MARTHA TEMPLE, Ruthven's Relict, *against* LORD FORRESTER.

1685. *December* 1.—THERE is a letter from his Majesty to the Lords of Session, in favours of Martha Temple, relict of Edward Ruthven, bearing, that she had a jointure provided to her out of the lands of Corstorphine; and seeing she is a stranger, that the Lords may summarily hear and discuss her cause. Her opponent was Torwoodhead, Lord Saline's son-in-law. *Vide* 25th February 1686. *Vol. I. Page* 380.

1686. *February* 25.—The case of Martha Temple, relict of Edward Ruthven, mentioned 1st December 1685, claiming her jointure against Lord Forrester and the creditors, and particularly my Lord Redford, is debated; and it was contended, that the aprisings upon that estate, in the person of Hugh Wallace, were satisfied and retired, and lying in the charter-chest, and assignations taken thereto since; and that Redford had renounced by a contract, and prorogated the legal reversion of his father-in-law John Boid's comprising on that land; and the communication was only a personal obligement, and could not exclude her, who was a singular successor. *Vol. I. Page* 406.

1686. The MALTMEN of LEITH *against* The MASTERS of KING JAMES'S HOSPITAL.

January 21.—AT Privy Council, the Maltmen of Leith and the Masters of King James's Hospital there, contending who should have the management of 2000 merks of the Maltmen's stock mortified to that Hospital, who craved it might be *primo loco* applied to the maintenance of the poor of their own trade in that Hospital; seeing, in all donations, the will of the donor is to be followed, and their own poor to be preferred:

The Privy Council referred this to the Bishop of Edinburgh, in regard it was a mortification within his own diocese, and the case had been formerly before him when he was a Privy Councillor; and he made a report that their poor should have the preference. *Vol. I. Page* 397.

February 26.—The Maltmen of Leith's bill, mentioned 21st January 1686, being advised; the Lords ordained their mortified money to go *primo loco* to the entertainment of their own poor in that Hospital. *Vol. I. Page* 406.

1686. *February* 27. LADY ROSS *against* YEOMAN.

THE case of Lady Ross and Yeoman being advised, the Lords find the deathbed proven; but, in regard the defender was minor, they assoilyied him from all the maills and duties uplifted, and did not draw back the effect of the reduction, neither to the citation nor to litiscontestation. *Vol. I. Page* 407.

1686. *March* 5. CHALMERS of BALBITHAN *against* DOCTOR CHALMERS, &c.

THE case of Chalmers of Balbithan against Doctor Chalmers and his Mother, being reported by Forret; the Lords sustain the order of redemption, notwithstanding of the irritancy, which is but *pactum legis commissoriæ;* and find the pursuer not liable in the annualrent of the consigned money, in respect of the offer made to Doctor Chalmers, being personally present, and the consignation of the money upon the Doctor's refusal thereof; though the reversion bore the Dean of Guild and the Treasurer of Aberdeen, and it was only offered to the Dean of Guild; unless he prove the money was lifted. And restrict the interrogatories to what is subsequent to the Doctor's letters, by which he declares the lands shall be redeemable from him. *Vol. I. Page* 407.

1686. *March* 11. GUSTAVUS CRAIG *against* WAUCHOP of CAIKMUIRE.

THE case of Gustavus Craig against Captain Wauchop of Caikmuire, was reported by Boyne; and the Lords find his obligation in the contract matrimonial correspective, and so behoved to be implemented *simul et semel* with the paying the tocher; as in Arthur Forbes's case with the feuars of Balveny in 1672.

The words of the interlocutor were:—The Lords find the letters orderly proceeded, the charger *simul et semel* employing the 2000 merks for the bairns of the marriage, (the wife being now dead,) in the terms of the contract; but assoilyied from the aliment given for many years to Gustavus's son, because it is presumed to be done *ex pietate*; he being grandfather, and having made no paction with his son-in-law thereanent. *Vol. I. Page* 408.

1686. *March* 16. LORD YESTER *against* SIR WILLIAM SHARP of SCOTSCRAIG.

MY Lord Yester having given in a bill against Sir William Sharp of Scotscraig; the Lords find that his uncle being in possession, by virtue of a tack, of the estate of Lauderdale, though it was expired, yet he might continue to possess *per tacitam relocationem* till he was legally warned. *Vol. I. Page* 408.

1686. *March* 17. THOMAS WILSON *against* FOULIS of RATHO and THOMAS LERMONT.

THOMAS Wilson's cause against Mr Thomas Lermont and Foulis of Ratho, mentioned 29th November 1683, and 16th January 1684, being reported by

Carse; the Lords assoilyied from Wilson's reduction; and find he must transfer the whole process, even those interlocutors that had been given after Ratho's death, on Mr Lermont's bills and representations. *Vide* 23d February 1688. *Vol. I. Page* 408.

See the prior and posterior parts of the report of this case pointed out in the Index to the Decisions.

1686. *March* 18. THOMAS HAY of BALHOUSIE *against* NEVOY of that Ilk.

THE case of Thomas Hay of Balhousie against Nevoy of that Ilk, was reported by Harcus: it was a pursuit for mails and duties of the dumb man's lands, whom the late Lord Nevoy had in custody. ALLEGED,—1*mo*, The dumb man's infeftment could not be reduced, *quod erat mutus*; for Craig is clear that both *muti et surdi* are *feudorum capaces*, and so is Matthæus, *de Afflict. ad Consuetudines Feudorum*. 2*do*, These rents were *bona fide consumpti et percepti*, by a lawful title of an act of the Lords, modifying his aliment to 1600 merks.

Yet the Lords restricted the aliment to and ordained the defender, his heir, to count for the remanent. *Vol. I. Page* 408.

1685 *and* 1686. The EARL of LAUDERDALE *against* The EARL of ABERDEEN.

1685. *March* 31.—THE Earl of Aberdeen gave in a bill against Lauderdale, craving, in regard he was going North, that no witnesses might be examined at Lauderdale's instance, against him in the Vacance.

The Lords refused the bill, but stinted the probation to be betwixt the 26th of April and 10th of May, when all parties will be in town at the Parliament. *Vol. I. Page* 360.

1686. *March* 23.—There is a letter from his Majesty to the Session, stopping the process betwixt the Earls of Lauderdale and Aberdeen, anent the Mint decreet, and the concussion and extortion of the bond, *sine die*, but during his Majesty's pleasure. This was complained of as *pessimi exempli* to property; yet they founded on the 18th Act of Parliament 1681, giving the King a cumulative power to evoke any cause; and that this was his own, and a gift flowing from himself. *Vol. I. Page* 409.

1685 *and* 1686. GEORGE SUITY of BALGONE and JOHN CUNNINGHAM *against* JOHN and JAMES HAY.

See the prior part of the Report of this case, Dictionary, page 14,340.

1685. *March* 20.—JOHN Hay having raised a declarator, mentioned 13th

December 1684, in name of his son James, that umquhile John Suity was *in liege poustie* when he made the disposition of his whole estate in his son's favours, and that he went to kirk and market unsupported, after the same:—ALLEGED by Suity of Balgone, called as heir,—1*mo*, No process; because all the nearest of kin, *viz.* Balgone's sisters, are not called. ANSWERED,—Balgone, who is the apparent heir, is called, and that is sufficient. 2*do*, ALLEGED,—The principal disposition is not produced, but only a copy attested.

This being reported by Drumcairn, the Lords repelled the first, because the apparent heir was called; and ordained the principal disposition to be produced, and the defender to see it against Tuesday; and, if he had nothing then to say, then they, before answer, ordained a conjunct probation to both parties,—the pursuer to prove *liege poustie*, and the defender, death-bed.

Four nice points came to be considered in this cause:—1*mo*, If the witnesses in the instrument of John Suity's going to kirk and market will not be obliged to depone that they were with him, and looking on all the time, from his coming out of the house till his going to kirk and market; or if it be sufficient that they met him on the street: seeing he might have been supported thither down stairs, or supported at rugged ground, when they looked away of purpose. 2*do*, If one's going out under night in winter, about five o'clock, when it is dark, satisfies the Act anent going to kirk and market: for going to any one of them is thought to satisfy; the design of it being to make the deed public, and seen by indifferent unconcerned witnesses; whereas the other way it may be done most latently and clandestinely, in presence only of domestic and picked-out witnesses. 3*tio*, If our law does only require the going to kirk or market unsupported, or if, *ad perfectionem et consummationem actûs*, he must not only come to it, but likewise return back, free and unsupported, to his house again, as the *terminus a quo* from which he set out: for this being required as the badge of sanity, how can it be clearly otherwise? and what if he shall fall in a swoon, or die in the return? 4*to*, If, in a case so circumstantiate, women may not be adduced as witnesses, especially where they become so necessary, by the secluding of all men from coming near the deceased person, whom they besieged; so, to render the probation difficult: and the law reprobates *nimia cautela*. For though it be not like *puerperium*, where other witnesses are not present, yet the contrivance is the same here. And, in the *Lady Monteith's case with her Lord*, women-witnesses were allowed to prove adultery; *supra*, 1*st January* 1684. See this case decided 23d March 1686. *Vol. I. Page* 356.

1686. *March* 23.—The case of Sir George Suty of Balgone and John Cunninghame against John and James Hays, mentioned 20th March 1685, is advised; and the Lords find the death-bed, and supportation in his coming to kirk and market, proven; and therefore reduced the disposition, and assoilyied from the declarator of *liege poustie*. *Vol. I. Page* 409.

1686. *March* 23. THOMAS AIKMAN *against* MARY LITTLEJOHN.

LORD Carse reported the case of Mr Thomas Aikman against Mary Littlejohn: Mr Thomas pursues on a comprising for maills and duties. ALLEGED,

—They have the benefit of a possessory judgment by virtue of an infeftment on a comprising; and so it must stand good till it be reduced.

ANSWERED,—There was an old Act betwixt them in 1667, ordaining Littlejohn to count and reckon; which interrupted the *bona fides*.

REPLIED,—1*mo*, That count and reckoning was now sleeping these many years, and behoved to be wakened. 2*do*, They had attained the benefit of a new possessory judgment since that.

The Lords found no possessory judgment in this case, and sustained process. The words are:—Find no need of wakening or transferring the same, and therefore, conform to Lord Carse's decerniture, ordain the Act of count and reckoning to be extracted, and a diet to be appointed for that effect before the auditor in the said count and reckoning. *Vol. I. Page 409.*

1685 *and* 1686. SIR DANIEL CARMICHAEL *against* SIR JOHN WHITEFORD.

1685. *December* 17.—The Lords heard the case between Sir Daniel Carmichael and Sir John Whiteford of Milnton, anent a seasine which is marked by the clerk of the register of seasines as registrate, but when the *registers* are searched, there is no such seasine found inserted or recorded there, nor in their minute-book; so it was ALLEGED to be null, because all that buyers and singular successors are bound to do, is to search the registers, and, if they find nothing there, they are *in bona fide* to buy or contract. On the other hand, it was contended, that the seasine must subsist in law, because all that can be done by one that is infeft, is allenarly to give it in to the register; and when he gets it back marked registrate, he is neither obliged nor concerned to see it actually registrate; but any who are prejudged have action of damage against the keeper.—See for this, Stair's Institutions, *tit.* 18, § 22.

The Lords having advised this narrow point on the 23d of December, they found Milnton could not quarrel his father's seasine as null on that head, that so he might have access to annul Sir Daniel's right as flowing from his father who was not infeft. And though the Lords were pressed by the lawyers to determine if it was null in general, yet they shunned it. So Milnton will cause one of his own creditors quarrel it, and then the Lords will be put to decide the general point; anent which, *vide* 25th March 1686.

This is now determined by the 19th Act of Parliament 1686.

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1686. *March* 25.—Whiteford of Milton's creditors their reduction, for annulling his father's seasine, that so Sir Daniel Carmichael's right might fall in consequence, (anent which, *vide* 17th December 1685,) was decided. Their first objection was, that though it be marked registrate, yet it is not truly registrate; and though three of the witnesses in the seasine depone *non memini*, yet the Lords sustained the seasine, because, by a bill to the Exchequer, it appears Sir John Whiteford had founded on this seasine.

This was an unnatural action, to tash his father's memory with a design of cheating. *Vol. I. Page 410.*

1686. *March* 26. CUNNINGHAM of AUCHINHARVY *against* DOCTOR CUNNINGHAM'S RELICT.

THE case of Cunningham of Auchinharvy against Doctor Cunningham's relict, now spouse to Denholme of Westshiels, was reported by Harcus. The Lords found, where a woman had a peculiar and reserved liferent from her husband's *jus mariti* by her contract of marriage, she might dispone or assign it *stante matrimonio*, without her husband's consent; (for here his consent could not be got, being fled, as on the plot and forfeited.) This interlocutor was adjusted, with consent of parties, to give Auchinharvey a legal right to uplift the sums. *Vol. I. Page* 410.

1686. *March* 30. STEPHEN ARNAULT *against* ALEXANDER HAMILTON and JAMES SCOULAR.

STEVEN Arnault in Rowen against Alexander Hamilton and James Scoular, merchants in Edinburgh. After debate, the Lords, before answer, ordain the said Steven Arnault, charger, to condescend who were the creditors to whom the French debts were due, and to instruct that the 70,000 livres were paid to them; and ordain the suspenders to condescend and instruct what eases and abatements the charger got of these debts; and also ordain the charger to condescend what sums he received by virtue of the factory, and what diligence he has done for such of these debts as are resting; and in like manner ordain the charger to condescend how Mr Scoular came to be debtor to the cash in 19,000 livres, and how the stock came to be debtor to the charger for the 6000 livres worth of goods sent to Scotland, and for the £1600, and the cellar-maill; and assigned the 1st of November next to both parties; and in the mean time recommended to three of their number to settle them; for Arnault had charged on a clear bond; whereof they raised suspension, that it was obtained by extortion from them, being in a strange country, and by circumvention, Scoular's estate and effects being concealed from them; and they founded compensation on the factory he had got from them, and on the clause of relief by which he was bound to pay the French debts, and the other grounds above written. And the Lords thinking it hard to reserve their action against Arnault for these compensations, they received them *hoc loco*.

Then, on a new hearing, they ordained the suspenders, Alexander Hamilton and James Scoular, to exhibit upon oath, in the vacance, before these three Lords, all books and papers they have concerning the society and copartnery, that the charger may be thereby able to condescend in the terms of the interlocutor; and also ordain them to give their oath of calumny, if they have just reason to deny that Mr Scoular was sole cash-keeper to the society; and ordain Mr Arnault to give his oath, if he has uplifted any of the debts due in Ireland, and if he has the instructions thereof: and ordained Arnault to give in an account of what articles contained in the factory he has received, and to exhibit the instructions of such articles as he has not received, and that at Rowen, before any whom Mr Hamilton should appoint to receive them. But Mr Hamilton urged, that the charger might condescend on

the diligences he had done for recovery of those debts contained in the factory, and that his acceptance of the instructions should be but prejudice to him to make the charger liable for such of those debts contained in the factory as might have been recovered by diligences. But the answer to this was, that the very title calls them bad and desperate debts; and that this being debated, the Lords took no notice thereof. They also granted a commission to Rowen, to examine witnesses, if Mr Scoular was sole cash-keeper: against which it was objected, that though it fell under the senses, and so was probable by witnesses, that he was cash-keeper; yet it did not that he was sole cash-keeper, because Mr Arnault might also have been cash-keeper. But it were absurd to suppose two.

Mr Hamilton grudged, that Arnault, Scoular's partner, had hooked them into a bargain at Rowen, to give £34,000 as his neat part and result of the effects, upon his assigning them to the whole count-books and annualrents of it; whereas many who are inserted in the count, denied the debts when they came to pursue them, and the Lords assoilyied them from the article of annualrents: so he was lesed by the transaction *ultra dimidium:* and if they would repone him, he offered Arnault the half of all. On the other hand, Arnault urged, that *transactio* was *finis litis;* and if the Lords would find the letters orderly proceeded, he would find caution to count for all thir grounds of compensation.

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1686. *March* 30. James Grahame *against* Jaques Mell.

Bailie James Grahame, in Edinburgh, against Jaques Mell in Rowen, who had fled thence for the persecution; and, upon letters from James Grahame, inviting him here, and promising him all security and assurance, had come to Scotland; and yet getting him engaged in a submission, and a decreet-arbitral, he was offering to distress his person thereon, though he had goods of his in his hands near to the value of 8000 livres, and the whole claim was but 10,000 livres.

The Lords ordained him to apply by suspension: and Bailie Grahame, by a bill to the Privy Council, pretending that he was about to flee, got a warrant to arrest him. They afterwards made some agreement. *Vol. I. Page 412.*

1685 *and* 1686. Agnes Nisbet *against* Isobel and Esther Smith and their Husbands.

1685. *February* 21.—Agnes Nisbet against Isobel and Esther Smiths, and Mr Alexander Bruntfield, and Scot, their husbands, is reported by Carse; and the Lords sustain process at the said Agnes the pursuer's instance. And also find, that the defenders having been silent for several years since the expiration of their respective pupillarities, so that they never did intent action for clearing their tutor-accounts, against Mr Alexander Heriot, their uncle, and late husband to the pursuer, till this process was raised against them by her; that therefore the pursuer must have payment of the debts now pursued for, without abiding the event of a count and reckoning anent her husband's in-

tromissions, as the defender's tutor; the pursuer always finding caution to the defenders to refund what she shall be found liable in upon her husband's account foresaid, in the event of a process of count and reckoning.

The case here was, that the assignations to their father's bonds were taken by him blank, as is alleged, in the assignee's name, before he was tutor, and filled up since, and so could not be paid *ex bonis pupilli;* though the other reason and presumption of law may here take place, *viz.* that he was paid by his intromissions, *et intus habebat.*

The decisions, *24th January* 1662, *Sir J. Ramsay* against *The Earl of Winton,* and that of *Grierson of Lag* against *Carruthers of Holmains,* tie them only to find caution; which the Lords have followed in this, and not that late decision, *2d December* 1679, *James Cleland* against *Bailie,* where an assignee's process was stopped till the tutor-counts were made. But that being a single practick, they resolved, after much reasoning, *(renitente Præside,)* that the two should preponder the one. And this decision was different from *Cleland's* in this, that the right of the debts was in his person prior to the office. Yet, on the 18*th November* 1679, *Thomas Lennox,* because trustee and factor for *Broughton,* was stopped from personal execution on clear debts, till he made count and reckoning to him.

But, upon a second debate, this cause being again reported by Carse, the 13th March 1685, the Lords rectified their interlocutor thus far, and sustained the defence, that the pursuer's husband acted as the defender's protutor before his acquiring the assignations to the debts now pursued for, and continued to act till the year 1682, and did not make an account; being proponed *peremptorie in causa, et cum onere maximarum expensarum:* and found the continuing to act (which takes off the taciturnity,) is proven by the writs produced; but that the defenders must also prove, that the defunct Mr Heriot, their uncle, had acted as protutor before the acquiring of the assignations to the debts now pursued for; and ordain the defenders to pay to the pursuer a year's annualrent of the sums pursued for, betwixt and Whitsunday next, the pursuer finding caution to refund the same, if, by the event of the count and reckoning, it shall not be found due. *Vide* 26th Nov. 1685. *Vol. I. Page* 342.

1685. *November* 26.—Agnes Nisbet against Smiths and their husbands, mentioned 21st February 1685. The Lords, upon Redford's report, refused to delay Nisbet the pursuer till the event of the Smiths' reduction, but decerned them to fulfil the disposition; and declared their obedience to this sentence shall not prejudge the defenders, in case they prevail in the reduction of the disposition *ex capite lecti.*

The Lords refused here what they are commonly in use to grant, *viz.* to decern, superseding extract for such a reasonable time as the reasons of reduction may be got discussed.

Then the principal cause being reported by Carse, on the 4th of December, the Lords, before answer, ordained both parties, *hinc inde,* to prove the points condescended on for inferring protutory or liberating therefrom, *viz.* whether Mr Alexander Herriot was the doer of their affairs, or was only present as their uncle, and an adviser; and who was the intromitter; and found the same probable *prout de jure. Vide* 30th March 1686. *Vol. I. Page* 377.

1686. *March* 30.—Agnes Nisbet craving by a bill to have her cause against Mr Alexander Bruntfield, &c., mentioned 26th November 1685, summarily advised, and the annualrent of her bonds to be paid her in the mean time during

the dependance; the Lords refused both, being now in the end of the Session. *Vide* 8th December 1686. *Vol. I. Page 412.*

See the posterior parts of the report of this case, Dictionary, page 12,081.

1686. *March* 30. FRANCIS KINLOCH *against* HAY of MONKTON and his BROTHER.

FRANCIS Kinloch gives in a petition against Hay of Monkton and his brother, craving the certification extracted by them *contra non producta* may be recalled, seeing he had offered to prove, by Monkton's oath, that he had papers in his hands, which *in græmio* excepted Francis Kinloch's lands, and he did not produce the papers themselves, but only deponed that his disposition excepted the back-tenement, but not the fore one.

The Lords would not recal the certification. *Vol. I. Page 412.*

1686. *November* 4. DOCTOR DONALDSON *against* SCOULAR'S HEIRS.

DOCTOR Donaldson pursuing the heirs of Scoular, factor in Rowen; the Lords found them liable to pay a bill of £154 sterling, on a missive letter wrote by them. *Vol. I. Page 426.*

1685 *and* 1686. JOHN JOHNSTON and EDWARD WRIGHT *against* BRUCE of NEWTON and BRUCE of KINNAIRD.

1685. *November* 19.—AT Privy Council, Bailie John Johnston of Polton, and Mr Edward Wright, advocate, pursue Bruces of Newton and Kinnaird for a riot, in taking away the teinds of these lands; though they stood infeft in them, and had a decreet of removing. ANSWERED,—An inhibition is the only habile way to infer a spuilyie of teinds, and not a decreet of removing.

REPLIED,—This is not a teind between an heritor and a churchman, (where inhibition is used,) but a third and teind between master and tenant.

The Lords demurred on this point. *Vide* 11th November 1686. *Vol. I. Page 376.*

1686. *November* 11.—John Johnston of Polton, and Mr Edward Wright, advocate, his son-in-law, against Bruce of Newton, mentioned 19th November 1685. They, standing infeft in his lands as creditors for great sums of money, pursue a removing: the other posterior creditors join with Newton, and OBJECTED, they had no right to remove him from the teinds, they not being apprised. ANSWERED,—He had comprised *omne jus*, which would carry the teind. *2do*, They were contained in a voluntary right they had.

Then they alleged payment; which was found relevant: but, in regard the the same was very improbable, they ordained the defenders to find caution for the violent profits *medio tempore*, seeing they stopped the removing. *Vol. I. Page 426.*

1686. JOHN MEIKLE *against* LAURENCE PARK.

January 7.—MEIKLE, a coppersmith, against Laurence Park, his prentice, whom he charged, on the indentures, for deserting him. The Lords, on Forret's report, before answer, ordained a mutual probation to be led on the points of fact after mentioned: *viz.* when the charger went out of the kingdom, and in what condition he left his shop; if he had a servant or servants therein who were skilful and experienced tradesmen, able to instruct the suspender in the art; and what materials were in the shop or house for marking; and how long he staid away; and if the charger, when he returned home, gave over his shop, and took himself to another employment than the coppersmith's, *viz.* the casting of bells and guns; and if the German, whom the charger brought home with him to help him, did refuse to teach the suspender, or to let him see his work, and threatened him if he looked on the same; and upon any other pertinent interrogatories relating to the matters of fact above mentioned. And also, before answer, allowed the charger to adduce probation of the articles of his special charge of damage sustained by his prentice's deserting. *Vide* 12th November 1686. *Vol. I. Page* 390.

November 12.—The Lords advised the mutual probation led by John Meikle and Laurence Park, in the case mentioned 7th January 1686. It was ALLEGED, —The charge being on mutual indentures, there were prestations on the master as well as on the prentice; and the master could not crave performance, unless he first performed his own part; and that the master had failed, by the qualifications mentioned *supra*, so that he had at least a probable ground of deserting him.

The Lords having considered the depositions adduced by both parties, they found the suspender had, without just ground, deserted the charger's service; and therefore, found the letters orderly proceeded against him until he return to his service and work two days for ilk day's absence; he having only served two years of the five; and also find the letters orderly proceeded against the suspender for the £40 of penalty contained in the indenture: but suspend the letters *simpliciter* as to all the rest of the charger's articles of damage.

This was subscribed by the President, conform to the new Act of Parliament. *Vol. I. Page* 427.

1686. *November* 18. LORD YESTER *against* The EARL of LAUDERDALE and his CREDITORS.

LORD Yester gave in a bill, craving, upon his adjudication and infeftment, that Mr John Buchanan, his agent, may be named factor for the estate of Lauderdale. ANSWERED for Sir William Sharp and the other Creditors,—If he get his annualrent, he was no farther concerned; and they offered him that. But he was not secured *pro futuro*.

The Lords refused Yester's bill. *Vol. I. Page* 428.

1686. *November* 19. PATRICK HALIBURTON *against* HUGH BLAIR.

THERE is a debate between Patrick Haliburton, merchant, and Hugh Blair, vintner, upon whom the hazard of a puncheon of Frontiniac wine, sold by Patrick to Hugh, and refused by him as insufficient, and never a perfected bargain, should fall; especially if it be embezzled before the delivery.

The President said, if it was a consummated bargain, the damage redounded to the buyer; *periculum erat emptoris non venditoris.* But, to discover if it was a complete bargain, the Lords, before answer, appointed a probation to be led, if tasting and spealling of a puncheon was the symbol of a perfected vendition of wines. Spealling is the cutting off a speal, that, by joining it again, they may know the property of the puncheon they had chosen.

On the event of the probation, Hugh Blair lost the cause.

Vol. I. Page 429.

1686. *November* 24. GEORGE BROWN, &c. CREDITORS of YEOMAN of DRYBURGH *against* JANET NISBET, Lady Dryburgh.

THE case of George Brown, late Provost of Dundee, and the other Creditors of Yeoman of Dryburgh, against Janet Nisbet, Lady Dryburgh, was reported by Kemnay. By a contract with her son, she had restricted her jointure of 16 chalders of victual to 1000 merks yearly, under an irritancy, that, if two terms should run in the third, she was to be in her own place: and this being incurred, she craved to recur. ALLEGED,—This could not be declared in prejudice of the innocent creditors, minors, ignorant of that clause; and she had, *dolo affectato*, suffered it to fall, and the very next day after Martinmas raised her summons, which was *nimia diligentia*; and they cited *Riccarton's case, supra, 23d March* 1686.

The Lords decerned in her declarator, and declared the irritancy; but superseded extracting till Candlemas next, and, in the mean time, allow the creditors to purge by actual payment to the pursuer; in which case they restrict her to the terms of her last contract: but declared, in time coming, if the creditors suffer the irritancy to be incurred, the Lords will not allow them to purge; but ordain the pursuer to give intimation that she is not paid, before the elapsing of the second term, and that to the real creditors by instrument.

The Lady gave in a bill complaining of this interlocutor, and craving it might be re-considered upon sundry grounds; but the Lords adhered to their former interlocutor, with this addition, ordaining the present or succeeding factors to make payment to the Lady upon her discharge, *primo loco*, before any of the creditors.

Vol. I. Page 430.

1686. *November 26.* The CREDITORS of the DUKE of LAUDERDALE *against* The EARL of LAUDERDALE and LADY YESTER.

THE case of the Creditors of the Duke of Lauderdale, against the Earl of Lauderdale, and Lady Yester, his heirs of line and tailyie, is heard in presence. The creditors are constituting their debts, in order to adjudge, within year and day, of Lady Yester's adjudication. She opposed it, to cast them without year and day; and objected against the grounds of their debt:—1*mo*, Against Niddry's bond, that his assignation from his father was not intimated in his father's lifetime; and so it was still *in bonis defuncti*. 2*do*, It was vitiated on the back, two lines being delete, which might have been a discharge. 3*tio*, It was transferred to Sir William Sharp, who was or might have been paid by his tack.

ANSWERED,—They would adjudge on their peril, and all their objections will be reserved entire, till the competition for the maills and duties: and the scoring on the back has been only a note of its registration, and it has been taken out again. 2*do*, *Non relevat* that Sir William might have been paid, unless they will instantly verify that he was actually paid: for it was not just, when I am *in cursu diligentiæ*, that you, who are the heir of line, and have a prior adjudication, should retard me, to prefer your own, and engage me in a tedious count and reckoning: and that whatever is not instantly verified should be reserved, as accords.—Which the Lords found just, and sustained.

Then, 2*do*, ALLEGED,—The Duke of Lauderdale's bond of relief to his brother, now Earl, can be no present ground of debt, without distress or payment. ANSWERED,—It is not a common clause of relief, but a bond apart, obliging to pay and relieve betwixt and a prefixed day. REPLIED,—That should be declared by a sentence. DUPLIED,—This summons is alternative, either to pay or relieve.

The President moved, What if the principal debtor should pay it in to the cautioner? How is his land relieved and disburdened, if he should not apply it? It was offered, that it should lie in the clerk's hands for that use.

3*tio*, ALLEGED,—The bygone annualrents appear to be paid by Sir William Sharp's counts, now produced. ANSWERED,—His declaration is good against himself, for his own debts, but not for others.

The Lords allowed them to adjudge for what bygone annuals they pleased; but with this declaration, seeing Yester produced such evidence as induced *semiplenam probationem*, if it should be afterwards found that they had adjudged for more than was due, it should not save them, in order to restrict it to what was truly resting, but should be null *in totum*.

Against which, it was ALLEGED,—That, this adjudication containing sundry creditors' debts, such an error could prejudge none but him that committed it; *nam quot articuli tot libelli*.

The Lords declared it should only annul that creditor's sum.

Then the creditors pressing that the Lady might give in a renunciation presently, seeing she had renounced to her own children already; the Lords gave her ten days, seeing her former renunciation was not general; and that they might take out their adjudication against the heir-male, (seeing he had renounced the benefit of discussing the heir of line first,) without the heir of line's re-

nunciation: and ordained the decreet against him to be of the date of the first pronouncing; that so they might, at least *quoad* him, be within year and day of the first adjudger. *Vol. I. Page 431.*

1686. *November 27.* The Earl of Cassilis *against* Montgomery of Lainshaw.

There is a competition between two tacks of teinds discussed. The late Bishop of Galloway sets a tack, to Montgomery of Lainshaw, of his teinds, when a former tack had two or three years yet to run, and gave up and cancelled the former tack. The Earl of Cassilis, after the out-running of the years of the former tack, gets a new one, and quarrels Lainshaw's tack, as set by anticipation; which is a lesion and dilapidation of the benefice, to the prejudice of the successor.

The Lords sustained the tack, though set when the other was not expired; seeing it was not set to begin when the other should expire, but commenced presently, without relation to it; and that the Bishop who set it continued Bishop when the other was expired, when he might have set it; and that the succeeding Bishops may do the same. But if a Bishop, when he is to be transported, should, *per universalem aversionem*, renew all his tacks, this would look like fraud and design. But the anticipating one tack will not amount to this.

Vol. I. Page 432.

1685 *and* 1686. Lady Banff *against* Lord Banff.

1685. *February 5.*—The Lady Banff gave in a complaint against her husband, that he refused to cohabit with her, and therefore craving an aliment might be modified to her.

He was jealous of her being disloyal to him with one Leslie, sheriff-clerk of Banff.

The Lords referred the consideration of this business to a committee; who having given in their report, on the 17th February, the Privy Council modified to her 2000 merks a-year, with certification, if it were not punctually paid to her termly, it should be doubled; and ordained the husband to aliment the children himself. He reclaimed much against this, his estate being low.

Vol. I. Page 339.

1686. *December 1.*—The cause of the Lord and Lady Banff being reported; the Lords preferred her to her aliment, though he offered to entertain her in his own house, and was pursuing an adherence before the Commissaries of Edinburgh; for the Lords found she was not bound to adhere, seeing the ground of the Secret Council's decreet, modifying to her 1200 merks of aliment, as mentioned 5th February 1685, was because of his atrocious cruelty to her; and this decreet was yet standing unreduced. *Vol. I. Page 433.*

1686. *December* 1. The LITSTERS of EDINBURGH *against* The LITSTERS of the CANONGATE.

THE Litsters of Edinburgh being erected by the Town-Council of Edinburgh, with the Bonnet-makers, on a recommendation from the Parliament, in 1681, with the privilege of excluding all others not tried by them, within the Town's liberties; they pursue a reduction and declarator against the Litsters of the Canongate, that they have no right to work without their license.

ALLEGED,—The Edinburgh Litsters, pursuers, had no interest to crave production of their writs and rights from the Barons of Brughton, and other authors, they showing no right from them. ANSWERED,—They derived right from the Parliament, where all Scotland was represented, and so might call for all their rights.

The Lords, on Saline's report, found the defenders obliged to produce all rights derived by them from the town of Edinburgh, the pursuers' immediate authors; but not their rights from the Barons of Brughton, except they produced the Town's right from the Ballendens of Brughton. See Stair, *24th November* 1671, *E. Sutherland, &c.* how far one nobleman can force the production of another's patents, wherein he has no interest, but only claims precedency. *Vol. I. Page* 433.

1685 *and* 1686. JAMES KINLOCH and PATRICK (or WILLIAM) SYME *against* CHARLES OLIPHANT and LORD TORPHICHEN.

1685. *January* 23.—IN the case of Mr James Kinloch and Patrick Syme, against Charles Oliphant, clerk, the Lords, on Kemnay's report, before answer, ordain witnesses to be examined *ex officio* on the matters of fact undermentioned, *viz.* if they heard Charles Oliphant say, that he esteemed the right made to him not to be worth a sixpence: as also the witnesses present at the communing between the said Mr James Kinloch and Charles Oliphant, whereby it is alleged that the bargain was deserted, and Charles got 1000 merks in satisfaction of his damage by deserting the transaction, to be examined what passed at the said communing. And ordain Charles to condescend, if the said disposition was in his hand shortly before Mr James Kinloch's death, and at what time it was: and ordain the pursuer to condescend on the names of the witnesses to be examined. And, in the mean time, recommend to the Lords Castlehill and Harcus to endeavour to settle the parties. *Vide* 3d December 1686. *Vol. I. Page* 333.

1686. *December* 3.—The Lords having advised the cause between Mr William Syme, Charles Oliphant, and Lord Torphichen, mentioned 23d January 1685; they preferred Charles's disposition from Mr James Kinloch, though base and gratuitous, without onerous causes, to a posterior disposition given by the said Mr James to Mr William Syme, whose sisters had paid debt for him, and relieved him out of the Tolbooth; though there were great adminicles of contrivance against Charles's right. *Vol. I. Page* 434.

1685 *and* 1686. MARGARET NAIRN *against* The LADY NAIRN.

See the first part of the report of this case, Dictionary, p. 13,256.

1685. *December* 1.—A BILL was given in by the Lady Nairn, for stopping the decreet pronounced against her, in favours of Margaret Nairn, as mentioned 9th December 1684, for payment of 22,000 merks, contained in her father's bond; on this reason, that my Lord Athole, her father-in-law, was absent, and that, being now 12 years old, she was not yet authorised with curators, for which a competent time behoved to be granted her.

The Lords, on thir pretences, superseded extract till the 1st of January. *Vide* 18th February 1686. *Vol. I. Page 380.*

1686. *February* 18.—Margaret Nairn, Muckarsie's daughter, pursues the Lady Nairn for 22,000 merks, contained in my Lord Nairn's heritable bond. ALLEGED,—This security was relative to a bond of tailyie made by Muckarsie, which had this quality, that, if any of his two daughters died, then her portion should divide thus: *viz.*—6000 merks to his brother Greenyards; 2000 merks to his other brother Strathurd, and the other 2000 merks to the surviving sister; so it is, one of the sisters is dead. ANSWERED,—My Lord Nairn's bond is simple and absolute, and bears no relation to that tailyie, which was reprobated on all hands as done *in lecto*. REPLIED,—It must be presumed to be correspective, because it is for the same sum, *inter easdem personas*, and the same terms of payment.

The President inclined to cause the pursuer find caution, to secure the Lady Nairn against that tailyie and Greenyards's claim; but, because there was only a copy of the tailyie lying in process, the Lords, on a bill, allowed the Lady Nairn a diligence to the 15th of March, against George Dallas, or other havers, to recover it. *Vide* 18th November 1686. *Vol. I. Page 405.*

1686. *March* 24.—The case of the Lady Nairn against Lady Muckarsay being reported by Boyne, the Lords found, seeing her husband now concurs, the process must go on; though his name was not *ab initio* in the summons; but that the license to pursue was not sufficient, without a decreet dative were also produced. *Vol. I. Page 409.*

1686. *November* 18.—Margaret Nairn, Muckarsie's daughter, pursues the Lady Nairn for payment of 22,000 merks, as mentioned 18th February 1686. ALLEGED,—By the pursuer's father's tailyie, 6000 merks of this were provided to return to Greenyards, his brother, if any of his own two daughters died; and one of them is dead. ANSWERED,—Strathurd did not regard that tailyie, which he knew was on deathbed, but granted a simple bond, noway relative thereto; and, *actu geminato*, reiterated it by a bond of corroboration.

This being advised, the Lords repelled the allegeance proponed for the Lady Nairn, defender, and the declarator raised by her *quoad* the sum of 2000 merks, which, by the bond of tailyie, was to return to my Lord Nairn himself; as to which, they found him excluded by the new security he had given: but sustained the declarator to this effect, that the pursuer shall be holden and obliged to warrant and relieve the defender of the sum of 6000 merks, in case Greenvards his children shall prevail for the same: and therefore decerned for the

whole sum of 22,000 merks libelled, and the annualrents thereof; the pursuer, upon payment, being obliged to warrant the defender at the hands of Greenyards' children, as to the said 6000 merks, in case they shall distress her for the same; reserving always to the pursuer, action of reduction of the said bond of tailyie, *ex capite lecti*, or otherwise, as accords; and in case of reducing it, the warrandice to cease. *Vide* 8th December 1686. *Vol. I. Page* 429.

1686. *December* 8.—The Lady Nairn gives in a bill, craving the Lords may stop extracting of the decreet given against her, 18th November 1686, till she be secured by a reduction of the tailyie against Greenyards, *quoad* the 6000 merks; and craving, *quoad* the other 16,000 merks, that execution may be superseded till Whitsunday, it not being easy to raise such a sum between terms.

The Lords ordained decreet to go out; but sisted execution for the 6000 merks till the event of the reduction, and recommended to Carse to deal with them to supersede the 16,000 merks till Whitsunday next; the bygone annualrents being always first paid. *Vol. I. Page* 435.

1686. *December* 18. The Countess of Kincairden *against* David Murray of Stanhope.

The Countess of Kincairden's bill against David Murray of Stanhope, her son-in-law, and his answers, are advised. She represented, that, by her daughter's contract of marriage with Stanhope, she assigned him to an infeftment of 12,000 guilders for her tocher: and was obliged to instruct that these 12,000 guilders to which she assigned him, were a part of 25,000, due to Van Villiers; and to get a valid disposition to it from her brother Somelsdyck Van Arsen, and to obtain a decreet of preference before my Lord Cardross; and that she had done all this, and yet Stanhope had raised inhibition on the contract, and an arrestment of all her jointure: and, seeing she had performed, craved the Lords would annul the inhibition and arrestment.

The Lords recommended to Drumcairn to compare the contract with the papers produced by the Lady; and, if she had implemented all, allowed him to recal the inhibition and arrestment.

This summary way, without a process, was yielded to the Lady's solicitation. But a hearing, in presence, being obtained on the 20th of January 1687, it was debated, that the Lady had not fulfilled the foresaid three conditions adjected to her obligement in the contract of marriage.

The Lords repelled the allegeance that the right is not *habili modo* transmitted to Somelsdyck by the nomination of the testament produced; which they sustained. And repelled the other allegeance, that, the right being only a right of relief, there is no distress nor payment instructed, in regard of the decreet of preference,—the Countess of Kincairden always producing the decreet. And, before answer to the allegeance anent the import of the Countess's obligement in the contract of marriage, ordained the commoners, and the writer of, and the witnesses in the said contract, such of them as are alive, to be examined, if it was the meaning of the parties that the obligement granted by the Countess for obtaining a decreet of preference to my Lord Cardross, should extend

to the tenement and yards in Culross, or not. But there seemed to be no dubiety in the clause.

There was a bill given in against this by Stanhope, which was referred to Carse and Drumcairn; and they having reported it on the 25th of February, the Lords adhered to their former interlocutor. And Stanhope reclaiming again by a bill, containing some reflections on the Lady, the Lords resented it, and referred it to the President, to consider how far the papers produced (the originals were in Dutch,) proved Van Arsen was cautioner, and that this 12,000 guilders was a part of the 25,000; and Mr William Stirling's oath was taken on the last point, as one of the commoners. *Vol. I. Page 489.*

1687. *January* 14. FERGUSSON of CRAIGDARROCH *against* WILSON.

FERGUSSON of Craigdarroch pursues Wilson for payment of the price of a house. ALLEGED,—By the bond, you are tied to purge certain inhibitions. ANSWERED,—I will find caution to secure you against them.

The Lords, on Edmonston's report, ordained the decreet to be extracted, as to the annualrents, (seeing they were in possession of the land;) and, as to the principal sum, sustained the defence founded on the inhibition, *until the same* be purged; and ordained the pursuer to exhibit the progress and other writs to the defender, upon oath, and the defender to condescend on his damage and prejudice through the want of the Earl of Nithsdale's consent; and likewise to condescend on such writs as are wanting in the progress: and remitted to Edmonston to consider the progress and the damage, and to report.

Vol. I. Page 440.

1687. *January* 14. The DUCHESS of LAUDERDALE *against* JAMES STEILL.

THE Duchess of Lauderdale pursues James Steill, her coal-grieve, to remove from a house. ALLEGED,—He could not be removed between terms, and he had made sundry reparations thereon. ANSWERED,—He was *in mala fide.* Yet *l.* 38 *D. de Petit. Hæredit.* allows even *prædonem deducere impensas utiles et necessarias.*

The Lords, on Edmonston's report, superseded execution of the removing till Whitsunday, and ordained the meliorations to be visited and valued.

Vol. I. Page 440.

1687. *January* 14. CONGALTON of SCAITSBUSS *against* BUTLER of HARPENDEAN.

THE case of Congalton of Scaitsbuss against Butler of Harpendean, was advised. He was pursuing for 5000 merks of his wife's tocher. ALLEGED,—1*mo*,

The pursuer had, by a paper, restricted it to 4000 merks. *2do*, In payment of part, he had taken an assignation to some victual; and referred both to oath. Scaitsbuss deponed to the first, he gave a declaration, in 1681, that if, within a year, they paid him 4000 merks, he should accept it; and being put in Hepburn of Beinston's hand, and not fulfilled, he, four years after, gave it him back, and he cancelled it.

ALLEGED,—This was *pactum legis commissoriæ*, and still purgeable for 4000 merks.

The Lords refused to restrict him: but, as to the second, of the victual, they ordained him to be reëxamined, whether it was for this debt or another. See the like decided in Stair, *20th February* 1680, *Jameson.* *Vol. I. Page* 440.

1687. *January* 15. BAILIE BAIRD *against* HAMILTON of FALAWHILL.

HAMILTON of Falawhill owing Bailie Baird a sum of money, and he having received some of the rents of his lands for his annualrent, he offered to improve one of the receipts as false: but the Lords, after trial, sustained the discharge. *Vol. I. Page* 440.

1687. *January* 18. A SHETLANDER *against* ———.

A SHETLANDER pursues for maills and duties of some lands in Shetland, on a tack set to him by this King of Denmark's father. ALLEGED,—This was treason for the pursuer to take rights from a foreign Prince, and a disclaiming of our King. ANSWERED,—The King of Denmark might be our King's vassal in thir lands, even as a nobleman or gentleman, holding of the King, might give a charter to his sub-vassal. But, in Shetland, they have no infeftments, but only allodial rights; and the Crown of Denmark of old had right to it and Orkney.

The Lords ordained the tack and process to be razed and destroyed, and the pursuer to be insisted against for treason. *Vol. I. Page* 441.

1687. *January* 22. SIR JAMES COCKBURN *against* LAWRENCE POWER and —— DEANS.

THE case of Sir James Cockburn against Laurence Power and Deans, was advised. It was a pursuit against the heir of a cautioner for a sub-collector of the customs, excise, and bullion, in 1662, and thereafter, to count and reckon, when all the parties are now dead; wherein allowance was craved for his salaries, which they alleged were to be presumed to have been paid, though counts were not yet cleared betwixt them; and they were charged with twelve-pence for the ounce of bullion; whereas, by Act of Parliament, it was but nine-pence.

The Lords ordained Magnus Morton's books to be produced, and Sir Walter Seton, then conjunct tacksman, to depone on sundry particulars.

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1686 *and* 1687. JANET ALISON *against* GEORGE SHIELL.

1686. *January* 15.—JANET Alison, relict of Adam Steven, against Mr George Shiell, minister at Prestonhall. He having taken out a diligence after the 1st of November last, (which was the day to which it was granted,) it was objected against. He ALLEGED,—It was formal and *tempestive* enough to execute it any time before she extracted the act; and circumduced the term against him; as had been decided betwen *Sir Alexander Forbes and Tolquhon.*

This being reported by Saline, the Lords had no regard to the diligence, as not being *debito tempore* executed; but, *ex gratia,* allowed him to the 1st of February to adduce and close his probation, and to procure what writs and documents he was to make use of, to prove the inventary of the testament was exhausted, or that the debtors were irresponsal. *Vide* 22d January 1687.

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1687. *January* 22.—In Janet Alison's charge against Mr George Shiell, mentioned 15th January 1686; he offering assignations to debts, and she refusing them now, seeing he had not done diligence for many years; the Lords, at advising the cause, allowed Mr George Shiell, suspender, to assign, to the charger, as many of the debts contained in the inventary of the testament, as may satisfy the sum modified for her legacy, deducing a proportional part of the expenses of confirmation, and other necessary expenses debursed by him, at the sight of the Lord Redford, who heard the cause; the suspender always proving that the debtors in these sums are as responsal now as they were at the time of the confirmation; and ordain the diligence that shall be done by the charger, for recovery of these sums, to be upon the suspender's expenses.

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1684 *and* 1687. SIR PATRICK HOME *against* HOME of LINTHILL.

See the prior parts of the Report of this case in the Index to the Decisions.

1684. *November* 21.—SIR Patrick Home and Linthill's case, mentioned 24th November 1683, was debated and decided; and Linthill alleging that Sir Patrick could not lay his dam upon his ground:—ANSWERED,—The ground on the other side was the commonty of Eyemouth, wherein Sir Patrick had also interest. *2do,* Thir mills being built *super flumine publico, usus riparum* in such rivers is public.

But this is only for unloading goods, but not for a permanent burden: § 4, *Institut. de Rer. Divis. et l. 5, de eodem tit.* And Craig, *lib. 2 feud. dieg.* 8,

asserts, that, even *in flumine privato, pro reparando aquæductu vel clusa molendini, licet imponere ligna vel lapides in fundo vicinorum, iis invitis.*

Yet the Lords found Linthill had proven his interruption, *tam viâ facti quam juris,* of Sir Patrick's forty years' possession of that mill; and that Sir Patrick's mill makes Linthill's restagnate; and therefore assoilyied Linthill from his declarator, and found Sir Patrick could not impose a servitude of laying over his dam-head on Linthill's side of the water.

But Sir Patrick now thinks that his mill will go, though he do not build his dam-head close to the other side of the water, but mid-stream and more.

The words of the interlocutor were:—The Lords sustain Linthill's interruptions *via facti,* notwithstanding the agreement in 1625 produced, betwixt the Laird of Ayton and the Laird of Wedderburn; both because it is not instructed that Ayton was Linthill's author in thir lands, and that the said contract is only a personal deed, and Linthill is a singular successor; and therefore assoilyie Linthill from that point, whereby Sir Patrick craved power to affix the land-staill of his dam-head on the other side of the river, whereof Linthill has either right of property or commonty.

That reason of its being personal seems not good; for, in servitudes, (*v. g.* a bond of thirlage, &c.) a personal right is sufficient to constitute them without infeftment, even against a singular successor, where the bond is clad with possession. See Dury, 18*th January* 1622, *Turnbull* against *Blanerne;* and 12*th March* 1630, *Town of Edinburgh* against *Leith,* where an old servitude of girnelling is declared. *Vol. I. Page* 313.

1687. *January* 22.—Sir Patrick Home, advocate, against Home of Linthill, anent the mill at Eyemouth, mentioned 21st November 1684. The Lords, having considered the report of the probation, found this mill occasioned no restagnation to Linthill's mill; but, the land on the other side being Linthill's, they would not suffer Sir Patrick to lay his dam-head on that land, but to keep it on the trough of the water, and so *in alveo* as that it be not in the dead water, but in the middle of the current or stream.

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1687. *January* 28. CHRISTIAN JUSTICE *against* BUCHANAN of LENY.

THE case of Christian Justice, relict of John Buchanan, against Buchanan of Leny is reported by Kemnay. Leny, by a contract, was obliged to denude himself of the right of two sums due to her husband by Clackmannan and Seaforth, with warrandice from his own fact and deed; which two sums were evicted by Buchanan of Arnprior, on a former right he had got from the husband; but, by a posterior clause, Leny is obliged to warrant all her provisions, whereof this was alleged to be one.

The Lords found this posterior warrandice did not extend to make him liable for thir evicted sums, the warrandice being specific, only from his own fact and deed. And this being reclaimed against, the Lords adhered.

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1687. *January* 28. JOHN HAMILTON, Bishop of Dunkeld, and JAMES LAWSON *against* The LORD and MASTER of BALMERINO.

MR John Hamilton, Bishop of Dunkeld, and Mr James Lawson, his assignee, give in a bill against the Lord and Master of Balmerino, showing, that his action for proving the tenor of a discharge, mentioned 9th December 1685, was called, the dilators discussed, and avizandum made, and that their probation by witnesses who were old and valetudinary might perish; and therefore craved they might be examined on the adminicles for making up the discharge, to lie *in retentis*.

The Lords allowed a diligence to cite them. *Vol. I. Page* 443.

1686 *and* 1687. DAVID MELVILLE *against* The CREDITORS of CARSTAIRS of KINNEUCHAR.

1686. *January* 21.—David Melvil, a minor, having an adjudication on the estate of Carstairs of Kinneuchar, and having charged the Archbishop of St Andrew's, as superior; he gave in a bill, craving, that, during the ranking and discussing the competition among the creditors, they would modify and decern some of his bygone annualrents to be paid him by Robert Carstairs the factor. ANSWERED,—The factor was only placed by the Lords the last Session in March, and has had little intromission; and the pupil's father lifted three years' rent.

The Lords remitted to Castlehill to rank the creditors; and to consider if any annualrents should be given to the said David, or not. *Vide* 1st February 1687. *Vol. I. Page* 897.

1687. *February* 1.—The case of David Melvil against the Creditors of Carstairs of Kinneuchar was reported by Castlehill, anent sundry nullities objected to David's adjudication, *viz.* that it adjudged for a fifth part more, being of the whole lands.—But it was led before the Act of Sederunt 1684, rectifying that abuse *pro futuro*. *2do*, That the liferents were not deduced, nor the party's death proven, (but it was not denied,) nor the term of payment of one of the bonds come at the time of leading the adjudication, (but the term of payment of the bond corroborated was past.)

The Lords sustained the adjudication, and repelled thir nullities.

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1687. *February* 2. FRANCISCA CUNNINGHAM, and —— JOHNSTON, her Husband, *against* The EARL of GLENCAIRN.

FRANCISCA Cunningham and Johnston, her husband, pursue the Earl of Glencairn, on a minute of contract betwixt Chancellor Glencairn and Cunningham of Ballyachan. Against which the Earl had a declarator of nullity, 1*mo*,

That it was an undelivered evident, lying 38 years in Porterfield of Deuchal the writer's hands, and produced by him in an exhibition. ANSWERED,—It was a mutual contract, whereof there is only one double, and so neither could, nor needed to be delivered. REPLIED,—It bore registration, and so each might have got an extract; and it might have been made public by a process.

Next, ALLEGED,—It contained a *synallagma*; and Captain Cunninghame not having fulfilled his part, the Earl was not bound; *qui agit ex contractu reciproco debet prius docere omnia ex sua parte esse impleta.* ANSWERED,—Captain Cunningham's part was only the delivery of writs, and the minute in the end of it bears that he gave up a back-bond to the Earl.

REPLIED,—That cannot be the evidents meant in the first clause, which is conceived in the terms of a future obligement; and he either had such writs, or he had them not: if he had them, then he did not fulfil by delivering them; if he had them not, *dolus dedit causam contractui.*

The Lords, after a debate in presence, found Captain Cunningham's heirs could not seek implement of this minute of contract, in regard they had not performed their own part of it. Against this, a bill was given in, and refused.

Then Glencairn's oath was craved, if he had not those papers; and being offered, they resiled; so the Lords decerned. *Vol. I. Page* 444.

1685 *and* 1687. CAPTAIN JOHN ANDERSON *against* ANDERSON of DOWHILL and LECKY.

1685. *December* 3.—CAPTAIN John Anderson, in Glasgow, against Anderson of Dowhill, and Lecky. The Lords, having heard their mutual bills and answers, ordained Saline, who is auditor in the process pursued by Captain Anderson, to be likewise auditor in the other process raised since against him by Lecky and Dowhill, which was tabled before Harcus, to the effect, for avoiding confusion, and the interfering of two Lords, both parties may insist before him as they think fit, and make use each of them of their own clerk, in their respective actions; for this was a competition for two Lords, and two clerks: and ordained Anderson of Dowhill to answer that part of the bill, against tomorrow, of exhibiting the count-books, and anent his deponing about his making use of, or taking assignations to, retired bonds not purged by himself singly, but by the stock of the society.

This cause, upon report of Saline, was further decided on the 9th December; and the Lords found, seeing Dowhill was manager and book-keeper of the copartnery of the ship called the Providence, though the other partners had signed an account acknowledging a balance of £29,000 to be due to him, yet seeing it did not mention that the instructions of the articles on the debit side were shown to, and seen by them; therefore they ordained Dowhill to produce the journal and ledger-books, and such instructions as he had of the copartnery, with his accounts, upon oath; and remitted to the Lord Reporter to take his oath thereon, and on such interrogatories as he finds pertinent.

Dowhill reclaimed against this, as tending to propale his private fortune; and offered to show them to two merchants, but not to Captain Anderson.

The answer is, he was book-keeper, and so his accounts are *instrumentum commune* to all in the society with him. *Vide* 2d February 1687. *Vol. I. Page 381.*

1687. *February* 2.—The case of Anderson of Dowhill and Captain Anderson, mentioned 3d December 1685, was advised. The Lords found Dowhill behoved to allow the cargo of sack in the fore end of the £29,000 of balance due to him by the partners of the ship called the Providence, when they last fitted their accounts. And, before answer to the rest, ordained probation to be led, if Dowhill alone had the keys of the cellar where the goods lay, or if the rest had access thereto, as well as he. *Vol. I. Page 445.*

1684 *and* 1687. The Town of Edinburgh *against* The King's Tradesmen.

1684. *March* 20.—The case of the King's Tradesmen, *viz.* Mr Miln, his mason; Callander, his smith, &c. against the Magistrates of Edinburgh, was reported by Redford; and the Lords find the 153d Act Parl. 1592, and the 275th Act 1597, and the other Acts and exemptions given to these tradesmen, can only liberate them from taxes and burdens imposed by the town by their own authority, or for their own use; as, for bringing in the water to the town by pipes, making highways between Leith, Edinburgh, and the Abbey, mending the streets, &c.; but that they cannot thereupon plead immunity from the King's stents and taxations; the Acts of Parliament imposing these bearing no exception of their privilege; and it is hard to give them now, seeing, 1*mo*, These Acts were made when the King dwelt among us, and they were truly employed in his service; but now it is merely nominal, and they are titulars. 2*do*, They are the best and richest in their several trades; and it were unequal to free them, and lay their proportions upon the poorer. *Vide* more of this, 24th February 1687. *Vol. I. Page 283.*

1687. *February* 4.—The case of John Hunter, the Town of Edinburgh's collector of their cess, against those called the King's Tradesmen, mentioned 20th March 1684, is again reported by Redford; and the Lords found the suspenders' privileges did not extend to the impositions laid on for his Majesty's use; and therefore found the letters orderly proceeded against them; and assoilyied the Town from their declarator as to that point; but find and declare them free from bygones preceding Martinmas last *ob probabilem fidem.* A bill being given in against assoilyieing them from bygones, seeing the late Acts did not exempt them; the Lords adhered to their former interlocutor, in regard they thought the Town's proportion of the bygone cess was already made up without their parts.

Then a bill was given in reclaiming against exeming Deacon Callander, smith, that he could not be free of bygones, because, by a writ under his hand, he had condescended to pay them. *Vol. I. Page 446.*

1687. *February* 9. The Earl of Cassilis *against* Lord Bargeny.

The case of the Earl of Cassilis against Lord Bargeny was reported by Boyne. It was a declarator of non-entry. Alleged,—The Earl was obliged to receive Girvanmains, Bargeny's author, and his heirs and assignees, by a precept of *clare constat;* and my Lord Bargeny was his assignee, and so *exceptione doli mali repellitur;* and non-entries are odious, *et ejus putamina sunt recidenda.* Answered,—Nothing stops non-entry but *feudum plenum;* and Cassilis ought to be free of his bond, because he offered, by way of instrument, to implement it to Kennedy of Girvanmains, and was refused; and, he being now dead, it is impresentable to receive him.

Replied,—His cedent's collusion or contumacy cannot prejudge him, and it may be supplied *ex officio nobili per æquipollens.*

The Lords found the lands in non-entry, notwithstanding of the bond.

Then alleged, if the Earl do not perform, he must give back the composition paid, as *causa data non secuta.* 2*do*, This being *probabilis et justa causa litigandi,* it must excuse and exoner for bygone non-entries preceding the interlocutor.

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1687. *February* 15. Matthew Colvil, Writer.

It was on a certain occasion remembered, that, in 1678, in a cause of Matthew Colvil, writer, the Lords found that agents' disbursements bore annual-rent; and so does any advanced money, though it be not given as annual, which is only due *lege vel pacto,* but is liquidated as damage and interest *pro lucro cessante.*

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1687. *February* 19. Lady Balgon, Sir David Dunbar's Relict, Petitioner.

The Lords, upon a bill, and Drumcairn's report, modified to the Lady Balgon, relict of Sir David Dunbar of Baldune, 2500 merks, for her mournings, and aliment of the family, from the 12th of December last, when he died, to Whitsunday next, allowing in the fore-end what she has got already.

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Duke Hamilton, whose son was married to Baldune's grandchild, stormed at this; and craved deduction for what provisions were laid in the family at his decease, she having none but two servants to maintain. Her grandson, Sir George Suty, obtained this from Castlehill, his father-in-law.

MS. No. 769, *Page* 323.

1678—1687. Sir Andrew Ramsay of Abbotshall *against* The Town of Kirkcaldy, and the Heritors of the Balsusney-acres.

1678. *February* 26.—Sir Andrew Ramsay of Abbotshall pursues the inhabitants of Kirkcaldy, and possessors of the adjacent acres, and others, astricted and thirled for abstracted multures from the West-mill of Kirkcaldy. Alleged,—1*mo*, By a decreet-arbitral proceeding upon a submission betwixt George Boswell, then heritor of that West-mill, and the Town of Kirkcaldy, he is restricted allenarly to take a peck of ten firlots; and yet now he pursues for more, *viz.* for a peck of two bolls. Answered,—The quantity pursued for is contained in the pursuer's own and his author's infeftments; and the decreet-arbitral never took effect by possession, and so cannot bind him, who is a singular successor; and, it being a servitude, it is *certissimi juris* that servitudes, unless clad with possession, can neither be constituted nor destituted.

2do, It was alleged for the Heritors of the acres,—That they sold their corns growing on these acres to the inhabitants of Kirkcaldy, and there it was either brewed or brought to the West-mill, and paid multure; and so could not pay twice. Answered,—That was nothing to the pursuer; for what it paid in the Town of Kirkcaldy was because it fell under *invecta et illata*; but *omnia grana crescentia* on these acres were astricted; and let them pay for them on the ground, and then carry them whither they will; otherwise their corns should be no more thirled than that which comes from Loquhaber, or from other seas, as Dantzick.

This being reported by Craigie, Justice-Clerk; the Lords having heard his report, and seen the decreet-arbitral produced, they find, that, by the decreet-arbitral, it is declared the Town was astricted, before the said decreet-arbitral, both as to *grana crescentia et illata*; and find, that the decreet-arbitral is sufficient to restrict the thirlage effectually against singular successors, unless the same be taken away by paction or prescription; and therefore find the pursuer's allegeance, that he and his authors have been 40 years in peaceable possession before intenting of the said defender's declarator of a peck out of two bolls, relevant to extend the thirlage thereunto, notwithstanding of the decreet-arbitral, unless there be interruption or contrary possession; which, if it be alleged, the Lords allow to the parties mutual probation. And repel the allegeance proponed for the rest of the heritors, as to one peck off twenty-four, notwithstanding that the same was sold to the Town of Kirkcaldy and grounded there.

Then the defenders alleged the pursuer behoved to say his possession was universal and uniform; and that, for 40 years, he never received less.

This were strange and impossible to prove; but all in reason he can be obliged to, is, to prove that the general stream of the custom and his possession was for him and his millers to exact, and for them to pay, the duties mentioned in his infeftments, and now acclaimed: for, if, for favour or other personal respects, or to engage them not to abstract, the miller gave them sometimes an ease, yet, if that was not general, it can in no sense prejudge the pursuer, else it shall be in the power of any miller to low his master's rent and

give it away. See thir same parties and cause at the 18th of July 1678.

Advocates' MS. No. 730, folio 320.

See the numerous intermediate parts of the report of this case, Dictionary, page 9409, *et seq.*

1680. *November* 24.—The Lords advised the probation betwixt Abbotshall and the Town of Kirkcaldy, (11th Feb. 1680,) anent the 40 years' possession of the quota of the multure, whether it had been paid conform to a peck of two bolls of malt, as his charters and infeftments bore, or at a peck of 10 firlots, or a load of malt only, conform to the decreet-arbitral produced by the town; and found, by the witnesses produced, that Abbotshall, Dalhousie, and George Boswel his authors, have been in peaceable possession of a peck of two bolls of malt 40 years before the intenting of the Town of Kirkcaldie's declarator; and that the witnesses adduced by the Town had not proven any such interruptions as might take off the said prescription. But declared they would further hear the parties as to the interruption founded on the decreet-arbitral mentioned in the decreet of suspension obtained by Abbotshall against the Town of Kirkcaldy in 1664, produced by himself; and anent the quality of Abbotshall's possession, whether the same, not being proven by him to be universal and uniform, imports an interruption or not.

Upon which interlocutor, it being ALLEGED for Abbotshall, that the decreet of suspension produced by him could never be a foundation whereupon the Town of Kirkaldy could ground any interruption, because though it bore in the debate that one of their reasons of suspension was, that there was a decreet-arbitral betwixt the Town and his authors, whereby he was restricted; yet there being a term assigned to them to produce it, they failed, and the term was circumduced against them; and, they never producing the said decreet-arbitral till after the 40 years, it could never impede prescription.

The Lords having advised this in the end of Feb. 1681, they found neither Boswell's decreet in 1636, nor the decreet of suspension in 1664, nor any contrary possession proven by the Town of a lesser quantity than a peck of two bolls, inferred an interruption; the decreet of suspension not founding expressly on the said decreet-arbitral, for instructing a peck to be due only out of ten firlots.

Then Kirkaldy gave in a bill against this.

But the Lords adhered; only declared the prescription of the decreet-arbitral, as to the quantity of the multure, should not be prejudicial to other points of that decreet which were yet in observance. *Vide* 29th March 1682.

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1682. *March* 29.—The town of Kirkaldy presented a bill against Abbotshall, when he was extracting his decreet against them; (*de quo, vide* 24th November 1680,) which was refused; and the Lords adhered to their former interlocutor, and ordained his decreet to go out; notwithstanding of their clamorous representations against their paying of multure for imported malt, and their objections on the decreet-arbitral, why they should only pay a peck of ten firlots, and not of two bolls. Then they gave in a new bill, representing that they were oppressed by Abbotshall, with whom it was *impar congressus;* and begged his decreet might be stopped till they were further heard.

The Lords, after a strong debate, also rejected this bill. *Vol. I. Page* 182.

1683. *March* 15.—The heritors of the Balsusney acres, beside Kirkcaldy, being ordained to be reëxamined, in Abbotshall's process against them, for abstracted multures, (*vide* 12th December 1679,) they gave in a bill, craving they might depone on a commission. Which the Lords refused.

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1685. *January* 27.—Sir Andrew Ramsay's cause against James Law, and the other heritors of the Balsusney-acres, beside Kirkaldie, was advised. He having pursued them for abstractions, they had formerly deponed that they had brought their corn to his mill, and had paid the multure. (*Vide* December 12, 1679.) But, in regard there were two multures found by the Lords to be due, one of the *grana crescentia*, and another of the *invecta et illata*, and that they had only paid one of these two; the Lords, on the 24th of November 1680, ordained them to be reëxamined, if they had paid both multures, yea or not. And these second depositions being this day advised, they ALLEGED, a part of their town was built on the Balsusney-acres, and so they behoved to have the privilege of borough-acres, and be liable in one single multure.

Yet the Lords decerned against them for the multure of the increase and growth of each acre confessed. And, where their depositions were not special as to the quantity of the growth, the Lords decerned it to be 7 bolls the acre, as the common increase proven; and deduced 7 firlots off each acre, for the seed, which is excepted from the multure: (this is at the fourth pickle or curne:) and found that the teind, which is also free of multure by the contract in 1656, is the tenth of the growing corn: and that the multure they have already paid, is a distinct multure from the other, *viz. pro invectis et illatis*, and so cannot liberate from the other multure *granorum crescentium*: and found the said multure *granorum crescentium* to be a firlot on the acre, and the 24th peck. *Vide* 27th November 1685. *Vol. I. Page* 334.

1685. *November* 27.—The debate between Sir Andrew Ramsay of Abbotshall and the Town of Kirkaldy, mentioned 27th January 1685, was reported by Harcus. Their reasons of suspension against his decreet were:—1*mo*, That there never was a term assigned to the Magistrates to depone, and so they could not be holden as confessed, nor the term circumduced against them. 2*do*, The abstractions only concerned the tenants and possessors, and not them, the masters. 3*tio*, This common muir was a part of their borough-acres. 4*to*, The quantities of the *grana crescentia* were exorbitantly libelled.

Answered to the *first*,—A day was assigned to the tenants of Bogie, and feuars of Balsusney; and, in contradistinction to them, the same day was assigned to the haill other inhabitants of the burgh of Kirkaldy, defenders; which certainly comprehends the Magistrates. As to the *second*, It is true, the tenants are *regulariter* bound for the abstractions, multures not being *debitum fundi*, and the master is free; so Stair's Decisions, 10*th December* 1667, *Earl of Cassilis* against *The Sheriff of Galloway*. Yet here there was a specialty; for, 1*mo*, They had not taken their tenants obliged in their tacks to come to the pursuer's mill; but, on the contrary, had set their land as free. 2*do*, They had not proponed this defence in the decreet, but all along maintained their tenants as not liable, and spun out the debate for seven years; during which time, the tenants are either dead, removed off the ground, or broken and insol-

vent: and, so they having maliciously defended and prolonged the action, they become personally liable. And Haddington, in his Decisions, *15th June* 1610, *Laird of Balnagoun* against *Monro*, tells us, one was found liable for the violent profits *super eodem medio*, that he had maliciously defended the tenants in a removing. *3tio*, *Quoad* the sum paid by the tenant, the master is certainly intromitter and possessor, and so bound for its multure.——Yet where it is payable in money rent, this is dubious, seeing the master gets not the *ipsa corpora*, (which is the subject out of which multure is payable;) yet, *fictione brevis manus, et quia surrogatum sapit naturam, &c.* he is reputed to intromit with the victual itself. To the *third*, Thir lands lie a mile or two from the Town, and so are no part of their borough-acres. To the *fourth*, When this bill was presented in the vacance, a competent space was allowed them to prove the true rental; and they were instrumentally required, but did it not, because they were not lesed by that libelling.

The Lords repelled the reasons of suspension, and found the letters orderly proceeded; but recommended to Abbotshall to use them kindly.

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1687. *February* 23.—The case of Sir Andrew Ramsay of Abbotshall and the Town of Kirkaldy, mentioned 23d November 1687, is reported by Carse. The Lords repelled the first reason of suspension and reduction, in regard of the answer and decreet charged on, whereby they found there was no fact admitted to be proven by the charger anent the tenant's insolvency, and so it was not null for lack of that probation; and repelled the second, bearing the decreet to be *ultra petita*, for years after the libel, in respect the suspension is only for bygones preceding the year 1677: and also repelled the third reason, founded on the payment, as being repelled in the decreet of suspension,—as competent and omitted in the first decreet. But,—as to what discharges the suspenders shall instantly produce under the charger's own hand, or what the suspenders shall depone they made real payment of, in money, to the miller, (for eviting and discovering collusion,)—upon their getting his receipts, to be produced before extracting this decreet, ordain the same to be allowed.

Then Balcarras, provost of the Town, gave in a bill, pretending that *numquam susceperunt litem* for their tenants, except only by a bill given in by Sir David Thoirs; who disclaims that he was employed for Kirkaldy, but only for the Balsusney feuars. *2do*, If the Magistrates, their predecessors, malversed in neglecting the Town's affairs, they, as successors, cannot be liable, seeing *delicta suos sequuntur auctores*. ANSWERED,—1*mo*, An advocate's disclamation cannot deprive me of my *jus quæsitum*. *2do*, Magistrates, and their successors in office, *tenentur ex delicto decessorum*, as in subsidiary actions for prisoners escaping, &c.; and if they have been *in dolo vel culpa*, the present Magistrates, and the Town, have recourse and relief against them.

The Lords refused their bill; but yet found the letters orderly proceeded, against the last Magistrates only, (as being the suspenders;) and their cautioners in the suspension; which was a stretch; on this pretence, that Balcarras and the Magistrates put in by the King must not be discouraged.

But who will now lend to burghs, or bargain with them, if this hold?

Vol. I. Page 448.

1687. The MAGISTRATES of EDINBURGH *against* The COLLEGE of JUSTICE.

January 14.—SOME advocates and writers having given in a bill of suspension against John Hunter, collector of the King's cess in Edinburgh, ALLEGING,—That, by old exemptions from the Pope, at the institution of the College of Justice, and by the 153d Act 1592, and 275th Act 1597, they were free of all taxations; and, by the 23d Act 1661, all their privileges were ratified: ANSWERED for the Town,—The old exemptions, in 1547, were only temporary, granted by the Duke of Chattelherauld, then governor to Queen Mary in her minority; and he could give no more: and the posterior Acts of Parliament, exeming none but the Lords of Session, derogated from all former ones. *2do*, They complained that the Magistrates and the Stent-masters were free of stent. *3tio*, That themselves were overburdened.

The Lords, on Kemnay's report, found all the College of Justice (except the Lords,) liable to pay cess; and that Magistrates were free, in remuneration of their pains and trouble, by King James VI.'s sett, or decreet-arbitral, in 1583; as also the Stent-masters, by immemorial custom. And if there was any inequality, by imposing more on the rents and houses of the members of the Session than others, and if they had not the customary deduction and allowance of 20 *per cent.*, (wherever they gave up their true rent,) the Lords *ordained it to* be redressed and rectified.

They pretended also, that the incorporation's lands were free of cess; but they were not: and that the Town's common good was not stented; but what lies in the shire pays with it, and their imposts on wine and ale are casual.—Yet they may be as well valued as one's trade is. *Vide* the rest of this affair, 23d February 1687. *Vol. I. Page 440.*

February 23.—The College of Justice's declarator against the Town of Edinburgh, of their several privileges and exemptions from annuities, impositions at the ports, and Leith harbour, and causeway mailles, was this afternoon advised. Two points were left undecided; the one, as to the Town's criminal jurisdiction over the members in case of riots; the second, how far tradesmen could hinder the Session to bring within the Town and employ unfreemen, as tailors, masons, &c.; for which instances were brought on both sides.

The interlocutor is long, and needs not be here inserted, because it is printed by way of Act of Sederunt.

What the Town gained, was, it determined who were members of the Session; which cut off many pretenders. *Vol. I. Page 449.*

1684 *and* 1687. The COUNTESS of WEYMSS *against* MACKENZIE of APPLECROSS.

See the prior and posterior parts of the report of this case, in the Index to the Decisions.

1684. *December* 18.—IN the Lady Wemys and Applecross's cause, mentioned 3d December, the Chancellor openly rebuked Applecross at the bar,

that his agent had given his servant a dollar, to convey the information to him; and that he would not allow his servants to take any money from the people. And though the king's advocate excused it, by terming it a common practice, yet he declared he would not suffer it.

The President and the Lords were silent; and some of them appeared not to be much of the Chancellor's opinion. *Vol. I. Page* 322.

1687. *February* 26.—The Lady Wemyss gains her cause against M'Kenzie of Applecross, mentioned 23d December 1684. *Vol. I. Page* 450.

1687. *February* 26. James Hunter, Treasurer to the Advocates, *against* David Douglas, Advocate.

Mr James Hunter, treasurer to the Faculty of Advocates, having charged Mr David Douglas, advocate, to pay 500 merks yet resting of his entry-money, as coming in by a bill without examination, (for he had paid the other 500 merks;) he gave in a bill of suspension to the Lords, pretending the act for 1000 merks had never yet taken effect, and was but *ad terrorem*; and he would rather resign his gown, having but small employment.

The Lords stopped execution against him till the 1st of June.

Vol. I. Page 450.

1687. *June* 3. John Hamilton *against* Ninian Lowis.

A case, depending before the Bailies of Edinburgh, was brought in before the assessors, and much agitated among the lawyers, between Ninian Lowis, apothecary, and John Hamilton, Duke Hamilton's bailie-depute in the Abbey, who had set a shop, in Edinburgh, to Ninian; but he afterwards falling to be better provided *aliunde*, sets it to one Brown, who sold ale: and John quarrelled the sub-set on thir grounds:—1*mo*, That he has a cellar below, and this was *in æmulationem vicini*, and prejudged their change. 2*do*, That tacks are *strictissimi juris*; and so this not bearing to assignees, it was merely personal to himself; and he could not put in another, else he might bring in a rebel, and so render him, the landlord, obnoxious to the hazard of law; or set it to his enemy, or to one so negligent as might endanger it by fire. 3*tio*, In the present case *electa est persona*; and both Stair, *tit.* Tacks, and Craig, are clear, that they cannot sub-set the whole: for one may set off chambers, and parts of their house. Answered,—If I pay the maill, you are not concerned: but here your condition is meliorated; for you have both the tenant and sub-tenant liable for the maill; and the axiom against sub-setting is only against assigning, which is a total denuding, and a freeing of the first tenant: but a sub-set is lawful; and was so found 12*th March* 1686, betwixt *Sir James Rocheid and Moody*, sub-tenant to Haliburton and Borthwick; though that tack excluded assignees, and was in country lands; whereas this is *in prædiis urbanis*, where often the tenant is better than the landlord. 2*do*, Stair adduces

no decision, but gives his own opinion. And the Roman law is clear, *l.* 66 *D. Locat. quod nemo prohibetur rem quam conduxit fruendam alii locare, si nihil aliud convenit.* And though *habitatio* be a personal servitude, and of a far stricter nature than *locatio conductio*, (which is our tacks and assedations,) *et bonæ fidei contractus*, though *stricti juris* as to transmission, yet *habitationem habentibus permittitur, non tantum in ædibus degere, sed etiam alii locare; l.* 13 *D. de Usu et Habitat.* § 5, *Institut. eod. tit.* And Sir George Lockhart was of opinion that a tenant might subset. See Stair, *2d January* 1672, *Lady Binny.*

Vol. I. Page 454.

1687. WALTER SCOT of LETHAM *against* The EARL of MARISHAL.

February 16.—THE Lords advised a concluded cause at the instance of Walter Scot of Letham, against the Earl of Marshal, who suspended his bond of £9000, on this reason, that Sir John Scot had contravened the warrandice of his disposition, (for which the £9000 bond was given,) by making a prior right of the Stane of Benholm to Hercules Scot. ANSWERED,—He is only a consenter, which is but a *non repugnantia*, and he got no money from Hercules,—but the Earl got a renunciation of a wadset they had upon Urras; and if the Earl reclaim, they are content to repone, and be reponed.

The Lords found this a contravention, but that the offer to repone purged this contravention of the warrandice; and therefore found the letters orderly proceeded against the Earl. *Vide* 9th June 1687. *Vol. I. Page* 448.

June 9.—Walter Scot of Letham's charge against the Earl of Marishal, mentioned 16th February 1687, is debated of new; and the Lords adhered to their former interlocutor; but ordained the Earl only to denude with the burden of the rights, dispositions, and ratifications he had granted, as obliged thereto by his transaction with Sir John Scot; for the Earl of Marishal alleged it was impossible for him to repone him, because *res non erat integra*, he being taken obliged to ratify rights which otherwise he might have quarrelled.

The Lords salved this in manner foresaid. *Vol. I. Page* 455.

1687. *June* 10. GEORGE MASTERTON *against* WILLIAM MASTERTON.

GEORGE Masterton, writer in Edinburgh, pursues William Masterton on the passive titles, for payment of a debt; who ALLEGED it was paid: and he having produced some receipts of the date of the bond of corroboration, the Lords refused to allow thir receipts, unless they had been posterior; especially seeing they had not appeared to give their oath of calumny, if they had reason to propone payment. *Vol. I. Page* 455.

1687. JOHN ELIES of ELIESTON *against* WILLIAM LOCKHART.

February 14.—AT Criminal Court, Mr John Elies of Elieston pursues William Lockhart for the deforcement of Guthry and , messengers, employed to bring up Anne Elphingston, William's mother, by a caption, to depone on a diligence obtained by Elieston for exhibition of writs. ALLEGED,—1*mo*, The pannel could not pass to the knowledge of an assize, the dittay not being relevant, in so far as the caption was raised in the last King's time, and should have been renewed. 2*do*, It was raised against her when *vestita viro*, *viz.* Carriber, and now she is a widow. 3*tio*, They wanted the concourse of the Magistrates of Edinburgh and the town-officers. 4*to*, The process whereon it was raised, was sleeping. 5*to*, It was not libelled that the messenger showed his blazon. 6*to*, It was executed in December under night, after sun-set.

ANSWERED,—1*mo*, Whatever informalities were in the caption, he was not judge thereto; nor could this warrant him to beat the messenger. 2*do*, The Act of Sederunt, Feb. 16, 1685, continued all diligences raised in the last King's time, because there was no interruption in the Government. 3*tio*, If a caption might be executed against her when a wife, it being a fundamental in all policies and governments to attest the truth on oath, then much more now when she was *sui juris*. 4*to*, Only captions for debt required the Magistrates' concourse, where the rebel was to be imprisoned; but not captions for bringing in parties to depone. 5*to*, The process was wakened, and so also this caption. 6*to*, It is offered to be proven the messenger had the blazon, and showed it. 7*mo*, Captions may be executed at any time of the day or night. See M'Kenzie's Criminals, *tit.* Deforcement.

The Criminal Lords inclined to cast the libel, because it mentioned not the blazon; though his breaking the wand of peace is the only symbol requisite to be libelled: but they continued the diet for eight days: and then it was further alleged, that her name was interlined in the caption, and there was no execution against her on the first diligence, and so it was false. But the execution was abstracted.

And, on the 21st of February, the Criminal Lords having advised the relevancy of the libel, answers, and replies, they continued the diet till the third Monday of June, that the parties, in the mean time, might apply to the Lords of Session, and get their opinion on the foresaid objections against the caption, if they be sufficient to elide or mitigate the deforcement or not. See the decision of it *infra*, 17th June 1687. *Vol. I. Page* 447.

June 17.—The case of Mr John Elies and William Lockhart, mentioned 14th February 1687, was decided. It being remitted to the Session, by the Criminal Lords, to determine the nullities of the caption; Elieston alleged he was not concerned in the want of the execution of the diligence and other warrants of the caption; for that it was the clerk's part to keep these; and, *esto* it had been null, this could not authorise William Lockhart to deforce messengers, though it was in defence of his mother; for submission to the King's laws and his apparitors is preferable; *et omnes omnium charitates patria vincit.*

The President inclined to find that such an opposition was only a riot, to subject him to a fine; and not a deforcement, which would have made his escheat fall.

The Lords found the caption null, unless the execution on the first diligence were produced: but allowed Elieston, for adminiculating of it, to examine, like a proving of the tenor, if, when they copied the caption, they did not see the execution conform. And when they were thus put to it, the lads in the clerks' chamber produced a receipt of William Lockhart's, whereby he had borrowed up some executions of that diligence; which necessarily must be presumed to be this now amissing. This drew William to consent to a submission. *Vol. I. Page* 457.

1687. *June* 18. JOHN LAUDER *against* WILLIAM HENDERSON.

JOHN Lauder, chirurgeon-apothecary in Edinburgh, his action against William Henderson, tailor, for payment of an account of £42 Scots, was advised: it was furnished to his wife when sick: and the delivery and the prices being proven by his own man, and Dr Trotter, and other chirurgeons; the Lords found the account fully proven, without necessity of taking the pursuer's oath in supplement. And on a bill given in by John, representing how contentious the defender had been, and what expense he had put the pursuer to in discussing a suspension, the Lords modified £20 Scots for expenses of plea.

Vol. I. Page 457.

1687. *June* 18. LORD KINGSTON *against* LADY BELHAVEN.

THE Lords advised the action pursued by the Lord Kingston against the Lady Belhaven, (whose daughter he had married,) for her bond of provision of £10,000 Scots, which she had renewed in her servant, Mr William Brown's name, and inserted a power to herself to clog and burden it with what sums she pleased, and so made her assignation to carry these burdens.

The Lords found the Lady could not invert the nature of the bond; and therefore decerned. *Vol. I. Page* 457.

1687. *June* 21. DOUGLAS, Bishop of Dumblane, *against* MOIR.

DOUGLAS, Bishop of Dumblane, raised a reduction of a tack of some feuduties and teinds, set by his predecessor, Bishop Ramsay, to one Moir; because, 1*mo*, The tack wants the consent of the Chapter. 2*do*, It is to their manifest lesion. ANSWERED,—1*mo*, This is no part of the patrimony of the bishopric, but of the Abbacy of Dundrennan annexed to the chapel royal; and so needed no consent. 2*do*, The rental was truly augmented 200 merks more than it paid formerly, being now 1200 merks, and relieving him of sundry burdens.

The Lords, on Redford's report, before answer to the first reason of reduction, ordained the annexation alleged upon to be produced. And, as to the second reason, bearing the tack to be set in diminution of the rental; admitted that part of the duply to the pursuer's probation, that, before the expulsion of bishops, before 1687, the teinds set in tack paid a greater rentalled duty, or a greater tack-duty, than the duty of this tack now craved to be reduced.

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1687. *June 22.* The Earl of Cassillis *against* The Town of Maybole.

The Earl of Cassillis pursues the burgesses and inhabitants of the Town of Maybole, as his tenants or vassals, to relieve him proportionally of the poll-money, conform to the 3d Act of Parliament 1681, and the 34th Act 1685. Alleged,—Some of them did not hold immediately of the Earl, but of Kennedy of Danger, his val-vassor. *2do*, None of them were liable, because the Acts only impose that burden on those who are not separately valued themselves; but *ita est*, they are in the stent-roll, and pay to the collector of the cess of the shire of Air at the valuation of £141 yearly; and it expressly bears to be for Maybole, and its roods. Answered,—This is not for their trade and houses, but only for their acres.

The Lords, on Carse's report, find that the tenants of such vassals as are valued by themselves are not liable to the superior or over-lord for relief of his cess, on these Acts of Parliament: but, before answer to those vassals or their tenants who are valued in common, ordain the suspenders to condescend and instruct whether that article of the valuation be of the whole, and how the particular articles are subdivided, and in what manner the cess is paid by the Town; and if there be any persons therein free from payment of the cess.

Vol. I. Page 459.

1687. *June 25.* Duff of Braco *against* Arthur Forbes.

Duff of Braco's right on the estate of Balveny is preferred to Arthur Forbess's; for though Braco was agent in the cause, yet it was pendent before the employing him. The Duke of Gordon has acquired in Braco's right.

Vol. I. Page 460.

1686 *and* 1687. David Crighton *against* James Murray of Skirling.

1686. *March* 10.—David Crighton's action against James Murray of Skirling, being reported by Castlehill; the Lords sustained the pursuer's title to call for repetition *condictione indebiti*, though the right was his wife's, and she is dead, because of his contract of marriage produced; and reponed him against Skirling's decreet, in respect the translation to Mr James Ross was to the behoof of Skirling, now defender, and that it contained a discharge to two of the cautioners; and therefore it was unwarrantable to decern the pursuer and his wife for their parts of the sum: but find it relevant, *scripto vel juramento*, that the pursuer transacted the sum decerned for, and got an abatement thereof; which will import homologation against him. *Vide* 3d December 1686.

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1686. *December* 3.—In David Crichton's action against James Murray of Skirling, mentioned 10th March 1686, Skirling was allowed to prove that

David got an abatement by his transaction, *scripto vel juramento*. And he having produced some decreets for proving thereof, David gives in a bill, alleging the writs produced were made use of before the act was made, and had no contingency with the point admitted to probation, but were only thrown in to postpone and delay his decreet of repetition of the sum *indebite solutum*; and therefore craved it might be referred to Castlehill to consider the production, (he having made the act,) that, if they had no contingency to prove, then they might be rejected; seeing it would be long ere they could come in to be advised by the ordinary course of the roll.

The Lords remitted the consideration of the papers produced to Castlehill; who, on perusal, found a contingency. So the cause was enrolled to be advised. *Vide* 28th June 1687. *Vol. I. Page* 434.

1687. *June* 28.—David Crighton's repetition *condictione indebiti* against James Murray of Skirling, mentioned 3d December 1686, is advised; and the Lords, having considered the debate, and writs produced, and Castlehill's report, find the defence of transaction, and abatement of the sums paid by the pursuer to the defender, by virtue of Mr James Ross's decreet, not proven; and therefore decern against the defender for repetition of the haill sums paid by him to the defender, by virtue of the foresaid decreet, more than Alderston, one of the cautioners, his part, whom the pursuer represents. But, in regard, at Candlemas 1681, in the account betwixt *Dumfries and Newbyth*, it appears there was an abatement of the total sum made up of the sums contained in the decreet foresaid, and the annualrents thereof, and of extrinsic debts and their annualrents; that the said abatement may be constituted, ordain the clerk, at the sight of Lord Castlehill, to make up an account, charging the defender with the receipt of £3000, contained in the said decreet, and the annualrent thereof from Lammas 1649 to Candlemas 1681, and of the two extrinsic sums, and the annualrents thereof to the said time; and in so far as the sums to be made up exceed the £8802 truly received by the defender, to give him credit therefor, as the abatement then given, and for Alderston's part of the sums, and the extrinsic debts; and, in so far as these sums are less than the total charged upon the defender, to decern him in repetition of the same.

James Murray having given in a bill against this, and the Lords, on the 22d of July, having heard Castlehill report the points of the bill and answer; find the account produced under the pursuer's hand does not instruct the abatement or transaction, nor ought to be the rule of the account; and find, by the assignation granted by Skirling to Russel, and by Russel's translation to Mr James Ross, that Pitcairn of Forthar, one of the four cautioners, his part was discharged; and that therefore the defender, Skirling, or Mr James Ross his trustee, could not take decreet against the pursuer but for Alderston's fourth part, and for the third part of St Leonard's fourth part, being the fourth cautioner, who was insolvent; and that the defender ought to have credit for the annualrents of the annuals of the said fourth part, and the third part of St Leonard's part, from the date of the denunciation on the decreet in 1673 (conform to the 20th Act of Parliament 1621,) to Candlemas 1681, which is the time of the account and payment, which makes up the annualrents of the sums justly decerned, but not for annualrents of the annualrents of the sums which by this present decreet are ordained to be repeated and repaid; and therefore

approve of the calculation produced, and ordain the two partial payments made by Alderston and St Leonard's to be deduced, conform thereunto; and that the decreet be extracted for the balance.

This being also reclaimed against, the Lords, on the 26th of July, refused the desire of the bill, and adhered to their former deliverance, and ordained the calculation whereon the decreet is to be extracted, to be conform to the interlocutors, unless the defender will *instanter* prove his allegeance that the pursuer is heir of tailyie, or otherwise liable as intromitter with the goods and gear of the principal or cautioner. In obedience whereto James Murray having produced a disposition, granted by the said David to John Gibson, of a tenement, near the Court of Guard of Edinburgh, belonging to his father, one of the cautioners, bearing sums of money; the Lords, on the 29th of July, did not find that this gratuity inferred any passive title on David.

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1684 *and* 1687. ANDREW KER of LITTLEDEAN *against* ANDREW SIMPSON.

1684. *February* 14.—KER of Littledean's recognition against Simpson being reported by Boyne, the Lords ordained it to be heard in their own presence. The case was: a ward-vassal grants a wadset out of his whole ward-lands, for a sum of money far within the worth of the half of the lands affected, with a back-tack for payment of the annualrent; and the wadsetter is thereon infeft, but the granter is still in possession, and pays the back-tack duty punctually, and the back-tack is neither incurred nor declared. ALLEGED for Littledean,—That Simpson, his ward-vassal, had by this incurred recognition; because a wadset gives a right of property; and law does not consider for what sum it is redeemable, whether above or below the half of the land; but only if there be a real *alienatio et translatio dominii*, as is here, in giving the wadset over the whole ward-tenement. ANSWERED,—This wadset is but all one case, as if no more of the ward-lands were annailyied than what precisely would have paid the annualrents of the wadset sum, and the rest only given in warrandice of it; in which case there would fall no recognition; especially seeing the heritor is only in possession, and the wadsetter cannot attain it so long as the back tack-duty is paid him.

This point is new; but these casualties arising from *quasi*-delinquencies should not be extended. *Vide* this decided 29th June 1687. *Vol. I. Page* 270.

1687. *June* 29.—Andrew Ker of Littledean's declarator of recognition against Janet Law, relict of Andrew Sympson, mentioned 14th February 1684, having been debated on the 15th current, was decided this day. The defences were, 1*mo*, That the wadset granted to Sir Alexander Don (whereon the recognition is alleged to be inferred,) was only an improper wadset for 3200 merks, which is far within the half of the worth of the ward-lands, and consequently for a back-tack duty far within the half of the rents; and so the major part is not alienated, no more than in a total alienation for warrandice, or in liferent; and that it was so found in *Hay of Murie's case*, observed by Stair,

7th July 1681. And a sub-feudation of this nature would be lawful. *2do*, Littledean, the superior, by a bond was obliged to receive and confirm Haitly, the ward-vassal's creditor, in thir lands. *3tio*, He has homologated the wadset by acquiring it, and bruiking the lands by it.

ANSWERED to the first,—In a wadset, the property is alienated without the superior's consent, and the ward-vassal retains nothing but a tack as a tenant, which is merely personal, and no real right, (except allenarly in the case of transmission of the lands to a singular successor, by the 18th Act of Parl. 1449;) and if the back-tack were declared, recognition would certainly be incurred then. To the second,—His bond was only to confirm the particular creditors therein mentioned, whereof Sir Alexander Don was none; and, *esto* he was surrogated in Mr Alexander Strang's place, and with his money paid Strang, yet our law knows no such substitution without a formal conveyance and disposition, else the prior right extinguishes. To the third,—He acquired the wadset not so much in contemplation of the ward-lands, (which he could bruik *alio titulo*,) as of some blench lands also contained in the wadset.

Yet the infeftment being granted out of both blench and ward-lands, was not sustained to secure against a recognition, in *Cromarty's case, supra, 23d Feb.* 1683.

The Lords having advised the debate and writs, they repel the defence founded on the back-tack set by the wadsetter to the vassal, reverser; and find the recognition inferred by the wadset's being over the major part of the feu, however small the wadset sum be: and also repel the defence founded on the superior's obligement to confirm Strang's wadset, the same being only personal to Strang, and not for Sir Alexander Don's wadset: but sustain the third defence of homologation, and find the same proven by the qualification of taking a disposition of the lands from the wadsetter, (though blank in the receiver's name,) and by producing the same, and debating thereon in this process; and therefore assoilyied from the recognition. *Vol. I. Page* 460.

1687. *June* 29. JOHN WARDLAW of ABDEN *against* SIR HENRY WARDLAW of PITREVIE.

THE reduction, *ex capite fraudis et circumventionis*, at John Wardlaw of Abden's instance, against Sir Henry Wardlaw of Pitrevie, was debated; *viz.* that old Pitrevie, to whom the defender is served heir, being the pursuer's tutor and curator, he took no care of his education, but sent him to London under George Wardlaw, a most unfit governor, where he was trepanned by Sir William Ballantine, &c. to marry a common whore; and then George (under the pretence that it was better his cousin Pitrevie should succeed to him, than his spurious issue,) procured from him an absolute disposition to all his estate, in land and money, worth 100,000 merks, giving him only 4000 merks by year; and to show that it was a premeditated contrivance, the lands are bounded, and the sums and dates of the bonds are all particularly inserted in this disposition, though it was done at London. And then he sent him to Holland, and pro-

cured a ratification of it there, when he was past 21 years; and having brought him home *anno* 1670, when he was 23 years old, he, at Dumfermline, impetrated from him another disposition of all, and restricted his annuity to 3000 merks a-year; and that the pursuer having complained of this to the Parliament in 1681 and 1685, they remitted it to the Session. And they were reducible deeds, the first being taken from a minor by his sole intromitting curator, *sine quo non*; and the second was *ante rationes redditas*, and a continued tract of the same cheat, and worse than *Cornelius Neilson's to Bonar's Heirs*, mentioned *7th December* 1682.

ANSWERED,—He was a perverse boy, and riotous, refusing to stay at home; and he choosed George Wardlaw himself, though he had at first Mr Robert Melvil, his own uncle, and a grave man, to be his tutor. *2do*, That the first disposition was acknowledged to be but a trust; but the 2d at Dumfermline was most onerous, and adjusted by the Lords Preston and Cranston, his friends; and if he and his mother (who has a great liferent) live long, it will be a dear bargain to Pitrevie. *3tio*, It is homologated since, by his discharging the annuity quarterly, and a new disposition since his complaint in Parliament, revised by Mr David Dewar, advocate, his good-brother. *4to*, Pitrevie bruiks by valid rights granted by a major not declared an idiot; and so they cannot be taken from him; and Dury, *5th July* 1635, *Leslie*, shows, that the Lords rejected a reduction on qualifications of circumvention stronger than thir. *5to*, Pitrevie cannot count now for his tutory, his father being dead and discharged, and so presumed to have given up all his instructions. But it was offered to be proven they were yet in his own hand. The President desired to know the true value of the estate disponed, that he might consider the lesion Abden had by the bargain.

This cause being advised on the 17th February 1686, the Lords sustained the many reiterated acts and contracts to purge the circumvention; and assoilyied.

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1687. *June* 29. The EARL of LAUDERDALE *against* JOHN WATSON.

IN the Earl of Lauderdale's removing against John Watson, late collector of the cess in the Merse, from a roum in Swinton; the Lords, on Saline's report, repelled his other defences, but sustained this, that Sir William Sharp, who stands in the right of that estate, gave orders to David Maitland to let him sit another year; and found it probable *scripto vel juramento* of Sir William.

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1681, 1682, 1684, 1685, 1686, *and* 1687. The CHIRURGEONS of EDINBURGH *against* The APOTHECARIES.

See the prior part of this case *supra*, page 408.

1682. *January* 24.—HIS Royal Highness the Duke of Albany and York

came to the Session, and was present at the debate between the Chirurgeons and Apothecaries, of which *vide infra*, 14th Feb. 1682. *Vol. I. Page* 170.

February 14.—The long debate carried on with much animosity betwixt the Chirurgeon-apothecaries and the simple Apothecaries of Edinburgh, (17th Nov. 1681,) was this afternoon advised and decided as to the first point of it, anent the conjunction of the two callings, *viz.* of chirurgeon and pharmacian in one person; but it was not reported till the next day, being the 15th of February. The words of the interlocutor were:—The Lords found and declared that the employment of chirurgery and pharmacy, being two distinct employments, and both requiring a great deal of care and knowledge, and various and distinct attendance, shall hereafter, within the city of Edinburgh and liberties thereof, allenarly, (so that the interlocutor extends not to other burghs or places of the kingdom,) be exercised by distinct persons, and that one and the same person shall not exerce nor be employed in both trades and employments. And that albeit chirurgeons may buy and sell simples as any druggist or other merchant may do, and may compound such drugs as are necessary for chirurgical or external operations, yet that they cannot compound any medicament to be taken internally by the mouth; excepting always from this declarator the present chirurgeon-apothecaries that are at present actual masters in both employments, and do actually keep shops within the Town of Edinburgh and liberties thereof; as to which bounds this declarator extends, and no farther: *and that* in respect of their being in possession, and of their experience.

See the English statutes, *anno* —— *Jacob. R.* where he expressly separates the office of a painter and a plasterer, and declares they shall be distinct. *Item*, the same statutes, and *Henrici Octavi, c.* —, where the College of Physicians is erected at London, and the privileges of the incorporation of Chirurgeons and Barbers there are fully ratified. By the civil law, one was both *medicus, chirurgus, et pharmacopœus*, all in one person, and commonly they were slaves or *libertini*; hence *l.* 7, § 8, *D. Ad. Leg. Aquil.—Si Medicus, id est Chirurgus, imperite secuerit*, &c. See *Calvin. Lexicon. Vocab. Medicus, et Chirurgus, et Pharmacus*, where he divides medicine into three parts, *viz. diætetica, pharmaceutica, et chirurgica.*

It was complained that the Session made so familiar with the Town of Edinburgh's constitutions and seals of causes, seeing all lawyers agree that *Collegia licita possunt facere statuta quæ ligant opifices istius universitatis.*

This interlocutor alarmed all, but especially the chirurgeon-apothecaries' apprentices, that they were debarred from the exercise of both employments, though they had *bona fide* given out a considerable apprentice-fee in contemplation of thereby obtaining the privileges in both callings. But to open the door to their whole apprentices, was to suspend the effect and commencement of their interlocutor for fifty years to come, at least. Therefore none had any hopes of being comprehended but such as had presented their bills, craving to be admitted free of that incorporation, before the date of the interlocutor; in which case there were only three, *viz.* John Lauder, James Muirhead, and Thomas Edgar. For John Lauder, I drew a bill to the Lords, showing the specialties and singularities of his case; that in law *actus inchoatus habetur pro completo, et cingendus pro cincto*; and there was a *jus quæsitum* to them by their indentures which cannot be taken away from them by a posterior and supervenient interlocutor;

and in all cases requiring *tractum successivum futuri temporis*, even Acts of Parliament themselves, and much less sentences of the Lords, can regulate nothing but future emergents; especially in correctory laws and interlocutors taking away privileges *bona fide* possessed by persons peaceably before these interlocutors; seeing he was on his trial, and was within a short space to have been admitted a freeman in both. Therefore we craved he might, in construction of law, be esteemed as an actual master, so that the interlocutor might not cut him off.

The Lords, having considered this bill, with the other two young men's bills to the same purpose,—upon the 8th March 1682, gave this deliverance on John's bill (and the rest got the same, *mutatis mutandis*:)—

The Lords having considered John Lawder's bill, in respect of his singular circumstances of his being on his trials in order to admission, albeit he be not as yet actually admitted a master in chirurgery and pharmacy, yet they allow him the benefits, immunities, and casualties that actual masters in both the said employments and public shop-keepers have by the foresaid interlocutor of the 14th and 15th February last, *viz.* that he may practise in both employments during his natural lifetime, and that how soon he shall be admitted in the ordinary way by the Chirurgeons and Apothecaries.

After this the simple Apothecaries and Physicians (who carried on this whole cause,) gave in a petition, craving to restrict the Chirurgeon-apothecaries to one table.

The Lords, in answer thereto, on the 24th March 1682, decerned the Chirurgeon-apothecaries, masters, who, by their former interlocutor, are allowed the exercise of both their employments during their lifetime, and the three young men, *viz.* John Lawder, James Muirhead, and Thomas Edgar, who by particular interlocutors are declared to be in that condition, albeit they be not yet actually admitted masters of both employments, to make their election, to meet and sit at any of the two tables of the said two employments; and to declare their elections betwixt and Tuesday next: and if they do not elect and declare betwixt and said day, the Lords decern them to sit only at the Chirurgeons' table, as the eldest and first erected trade. As also, they find that no master hereafter can take apprentices to make them freemen in Edinburgh, in any employment except in that for which they sit at the table; and that all the apprentices already entered are to be free only in that employment and trade, at whose table their masters sit.

Of the apothecaries' art honourable mention is made, 2d Chron. chap. xvi. and Exod. chap. xxx. ver. 25. *Vol. I. Page* 173.

1684. *March* 18.—The simple Apothecaries of Edinburgh gave in a bill to the Lords, representing that they had separated the two callings of Chirurgeon and Apothecary, (*vide* 14th February 1682,) and therefore craving that the privileges which the Magistrates of Edinburgh had by their Acts given to the Chirurgeon-apothecaries, when conjoined, might by the Lords be declared solely to belong to the simple Apothecaries now; and that the Magistrates might name them a visitor to that effect. ANSWERED,—This separation of the two trades was not to take effect till the present Chirurgeon-apothecaries were all worn out; and so, till then, the Apothecaries could not seek the application of these privileges to themselves *in solidum*.

The Lords ordained the Magistrates of Edinburgh, at their next Council-day,

to make an Act communicating these privileges to the Apothecaries alone, and to name a visitor; (which is to erect a new trade, whereas by the sett there can be only 14 deacons or visitors;) with certification that, if the Magistrates fail, they would do it for them.

Then, on the 26th March, a new bill of the Apothecaries is advised. The Magistrates of Edinburgh having, in obedience to the Lords' former deliverance, nominated David Pringle, Deacon of the Chirurgeons, to be visitor to the single Apothecaries, they complained of this as contrary to the Lords' interlocutor, on the 14th February 1682, disjoining the two employments of chirurgery and pharmacy; and therefore craved to be erected into a company by themselves. ANSWERED,—This was against King James's decreet-arbitral, discharging any meetings or conventions of burgesses, except of the 14 crafts, and was against the Act of Parliament 1606.

Yet the Lords of Session annulled the Town's nomination, and appointed John Joussy to be the Apothecaries' visitor, as to the sufficiency of their drugs, &c. for this year; and, in time coming, established this order, that the simple Apothecaries should give in a leet of three of the calling yearly to the Magistrates, out of which the Magistrates should choose one; or else the Town-Council to give them out a leet of three, out of which they should elect one, to be their visitor and overseer for that year.

This was thought a great infringement, to dictate thus, and *remodel the* Town's government. *Vide* 7th January 1685. *Vol. I. Page 282.*

1685. *January* 7.—A bill was given in by the College of Physicians in Edinburgh, craving that they would either allow them to name a visitor for viewing the Apothecaries' drugs, one of the Magistrates being present with them, or else that the Privy Council would appoint one; (see of this, 18th March 1684:) for the Physicians represented, that they were blamed when the patients died, and yet the fault was ofttimes in the unskilfulness of the apothecary-compounder, (their aim was against the chirurgeon-apothecaries,) or in the rottenness of his drugs. Abbotshall opposed this, and represented that, if the apothecaries' faults and extortion deserved regulation, it was as just that the physicians should be regulated also, as in Holland and France, where they had a *quart d'ecu* for each visit. The affair was committed to the Register and Abbotshall. *Vide* 25th March 1685.

The Register said, in complaining of drugs, they had great reason to notice an universal abuse in the brewers of ale, by poisoning it with salt to make it tasty, which spoiled and infected our blood. This was also referred, and committed. It was also represented, that they rubbed their barrels with the seeds of coriander, &c. which gave the ale a strong taste, and served instead of malt, and so might be sold cheaper, and was likewise unwholesome.

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1685. *March* 25.—The simple Apothecaries of Edinburgh having applied to the Town-Council, to name a visitor to their trade for this ensuing year, conform to the Lords' appointment, mentioned the 18th of March 1684; and they considering the Physicians' patent, ordaining a chirurgeon-apothecary to be likewise present at the visiting of the apothecaries' drugs, and an Act of Privy Council (7th January last,) relative thereto; they named two visitors for this ensuing year, *viz.* a chirurgeon-apothecary and a simple one. Upon this,

the Apothecaries gave in a petition to the Lords, complaining, that the Town of Edinburgh had vilipended and contemned their authority and act foresaid.

The Lords rescinded the Town-Council's nomination, and appointed John Foulis, apothecary, to be visitor for this year; and called in the Town's assessors and reproved them, for giving the Town advice to contradict the Lords' Acts, and to vote their decreets in their Council; seeing this was still to keep up the two trades in one, which the Lords had separated. They farther craved, in their bill, that the Lords would empower the calling of the simple Apothecaries to name a visitor to themselves: but the Lords would not grant this.

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1686. *December* 18.—The simple Apothecaries of Edinburgh gave in a petition against the Magistrates thereof and the Chirurgeon-apothecaries; complaining, that though the Lords had, by their decreet, separated the two callings, and appointed the visitor of the apothecaries to be only chosen out of themselves, (*vide* 20th March 1685,) yet they had so far contemned this, as to choose a chirurgeon-apothecary visitor, and even before John Joussie's year was out. The Town ANSWERED,—They were *in bona fide;* for the chirurgeon-apothecaries produced a new gift to them from the King, restoring them to all their privileges, and particularly to that of visiting the drugs, &c.

The Lords being dissatisfied with the impetrating these gifts to the hindrance of justice, ordained first the said gift to be produced; which not being done, they annulled John Baillie's nomination to be visitor, as being done by precipitation, before the other's year was out. *Vol. I. Page 439.*

1687. *June* 30.—The simple Apothecaries of Edinburgh having complained upon the Chirurgeon-apothecaries, that they had prevailed with the Town-Council to name one of them for a visitor; the Lords cassed the nomination, and appointed Hugh Neilson visitor for the year ensuing. *Vol. I. Page 462.*

See the College of Physicians of Edinburgh against George Stirling, an Apothecary, *supra*, page 366.

1687. *July* 2. DAVID LINDSAY *against* VANSOLINGEM and COLMAR.

IN the action pursued by David Lindsay, Secretary Melfort's servant, against Vansolingem and Colmar, the Dutch printers, and John Coupar and Mr Charles Lumsden, their cautioners; Magnus Prince and Captain Collison, the two arbiters, having pronounced a decreet-arbitral in favours of David Lindsay, on this colour, that the Dutchmen acknowledged, before them, the truth of the articles of his charge; and it being represented that they were strangers, ignorant of the language, and so might easily mistake; and that such confessions did not bind, except they were subscribed, as was found in Stair, *24th July* 1661, *Buchanan*;—the Lords had ordained the arbiters to be examined on what evidences they decerned, and what articles were acknowledged: and the Lords having advised their depositions, it was ALLEGED, for the Printers,—That the decreet-arbitral differed both from David Lindsay's count-book, under his own hand, and from a prior stated account of Captain Collison's.

The Lords, before sentence, recommended to the Lord Drumcairn to consider the account now produced, which is alleged to be Robert Collison's handwrit, and to compare the same with the other account that is stated by him and Magnus Prince, whereon the decreet proceeded; and if he find there is any contradiction or disconformity betwixt them, that he examine him upon the ground of the alteration. *Vol. I. Page* 463.

1687. *July* 5. JOHN RICHARDSON and ALEXANDER CRAWFURD *against* The FACULTY of ADVOCATES.

MR John Richardson, and Mr Alexander Crawfurd, advocates, who had entered by bills, declining to pay their whole 1000 merks, the Faculty ordered their gowns to be sequestrated, and they to be debarred, and kept out. Whereupon they complained to the Lords, who so far countenanced them, as to ordain their gowns to be restored, seeing that would break their employments; and seeing they had given bond, the Lords allowed to proceed *viâ ordinariâ* against them by horning: and being charged, they gave in bills of suspension, which were debated and determined on the 12th of July. Their reasons were:—they ought to be exemed, 1*mo*, Because several in their circumstances had been dispensed with. 2*do*, That it was contrary to the nature of a liberal science, *prætio nummario dehonestari*, and was only for mechanics; and that the Act of Sederunt in 1679, in *Nairn of Greenyard's case*, favoured them. ANSWERED,—Any dispensations given, were for such as entered prior to the Act of Sederunt 1684, which abrogated that in 1679.

The President inclined there should be no difference in the sum for the manner of entry. But it was carried against him, and the letters were found orderly proceeded; so they made payment of their other moiety of 500 merks. *Vol. I. Page* 463.

1686 *and* 1687. SIR THOMAS NICOLSON of TULLICOULTRY *against* The LAIRD of CARNOCK'S HEIRS.

1686. *September* 3.—THE Lord Napier (who was also Laird of Carnock,) dying in France, his maternal estate of Napier went to his aunt Madam Birsbane; but his father's fortune (which was the best,) fell in debate, between Sir William Nicolson of Tillicoutry, as heir-male and of tailyie, and the three daughters of Sir Thomas Nicolson, as heirs of line, married to Greenock, Mochrum, and Bancrieff; who raising brieves to serve, a bill of advocation thereof was presented by Tillicoutry, as served heir-male in general, and having a declarator of his right depending, which was *actio præjudicialis; et, lite pendente, nihil est innovandum.* ANSWERED,—1*mo*, The design of his declarator was, that they, as lineal heirs, should enter and denude; which they could

not do without a service: so he had no prejudice. *2do*, The lands lay in non-entry, which behoved to be obviated.

REPLIED,—If they served, he would be put to the unnecessary trouble of a reduction.

The three Lords would not advocate, (though it was done to *Mitchel in Prestonpans*, and to *Napier of Wright's-houses*, heirs in an *ultimus hæres*:) but finding the heir-male feared that they, being served, would attain the possession, they would not formally sequestrate the rents, (which belongs only to the whole Lords to do,) but discharged them to meddle till Candlemas.

It was objected against the service,—1*mo*, That the executions were null; because, by the 16th Act of Parliament 1672, none but writers to the Signet can be clerks to services; *et ita est*, the clerk to the granting the warrant for executing the brieves was not a writer to the Signet. *2do*, By the 94th Act 1503, the brieve must be executed before the officers of the town; which this was not. *3tio*, Sir John Dalrymple, though their advocate, was chancellor of the inquest. ANSWERED to the *first*,—A writer to the Signet is not necessary to the preparatory acts, but only on the day of the service. To the *second*, The Act is in desuetude.

The macers proceeded to serve, reserving to the heir-male reduction, as accords.

But if a thing be evidently null and informal, the Judge, by sustaining of it, *litem suam facit*. *Vide* 15th February 1687. *Vol. I. Page 423.*

1687. *February* 15.—Lord Lochore reported the mutual declarators pursued betwixt Sir Thomas Nicolson of Tillicoutry, and the heirs of line of Carnock, mentioned 3d September 1686, upon this point, Whether Sir Thomas Nicolson had tailyied his lands of Carnock to his heirs-male or not; seeing he had, in a minute of a contract of marriage, obliged them to pay his heirs-female such portions, and to aliment them; which, though not formally, yet materially implied a tailyie. ALLEGED,—This proceeded on a *falsa causa*, supposing a prior tailyie; and he could make none: for he was then a minor, having curators; and being without their consent, it was null. ANSWERED,—A tailyie is no lesion to a minor, though it be an alienation from the heirs of line.

The Lords ordained it to be heard in their own presence. *Vide* 22d June 1687. *Vol. I. Page 447.*

1687. *June* 22.—The mutual declarators anent the estate of Carnock, between Sir Thomas Nicolson, claiming as heir-male, and the three sisters married to Greenock, Bancrieff, and Mochrum, the heirs of line, as mentioned 15th February 1687, were debated. He, founded on Sir Thomas Nicolson's minute of contract of marriage in 1648, with the Earl of Lithgow's daughter, which seemed to tailyie the estate to heirs-male, by taking them obliged to pay the Lady's jointure, and to aliment the daughters, and to pay their portions; which could not be, unless the heir-male had been to succeed; for *cui incumbit onus, is etiam debet habere commodum*. ANSWERED,—1*mo*, He, being minor, and having curators, could not then make a tailyie, because that is an alienation of his estate from the natural heirs, and one of the most important settlements of a man's life. *2do*, The contract imports no tailyie, but only in favours of the heir-male of that marriage, or of his own body, but not at all to his stranger heir-male whatsoever.

REPLIED,—1*mo*, A tailyie is not an alienation. 2*do*, It was not revoked *debito tempore, intra quadriennium utile.* 3*tio*, By making this tailyie, there was no lesion to the minor himself; and unless a minor can qualify lesion, he is not reponed against an alienation of heritage *sine decreto judicis*; see Dury, *2d February* 1630, *Hamilton.* And in *Nicolson's case;* observed by Stair, *15th December* 1677, the Lords sustained Thomas Nicolson's breaking his father's tailyie, and paying his debts, as rational acts, though he was minor and did not adhibit the consent of his curators. To the 2*d*, A tailyie may be as strongly inferred by consequences as by their direct style; for, 1*mo*, All men naturally desire the preservation of their memory and honour, which is more perpetuated by the masculine succession than the feminine. 2*do*, The Roman law of the 12 tables preferred the agnatic line before the cognatic; and the *Lex Voconia* excluded women from the succession as long as there were males, though of a much remoter degree, till Justinian, by his Empress Theodora's instigation, levelled both sexes. And the feudal law lays this down for a principle, *ubicunque fit mentio hæredis in genere, semper est intelligendum de hærede masculo.* Craig, *Feudor. p.* 50, 241, *et* 248; and Sande, *Decis. Fris. lib.* 4, *tit.* 5, prosecutes this at large from all the topics of conjectures. 3*tio*, This being only a minute, it is ordained to be extended by advice of men of judgment. This is what lawyers call *abbreviatura notarii secundum sensum sapientis extendenda.* Now the Lords, as *viri boni*, and the supreme reason and sense of the nation, are in use to extend the wills of parties according to law, *ubi minus dictum quam senserant.* See Stair, *2d Feb.* 1667, *Poury;* and *2d July* 1667, *Sir John Sinclair.* And the Lords had so proceeded lately, in *Hay of Rattray's case* with *Hay of Boussie*, whose father had disponed his lands to his second son, with the burden of an aliment to the eldest, who was dumb; and the second dying without issue, the Lords found the eldest could not succeed to him *ex præsumpta defuncti patris voluntate*; and so preferred Hay of Balhousie his next cousin.

The sisters ALLEGED, the first Sir Thomas Nicolson who acquired the lands, made no tailyie, but took them to his heirs whatsomever; and they also cited *John Charteris' case, supra, 14th March* 1682, where there were more presumptions of a tailyie than here, and yet the Lords rejected them; as also that Zelophehad's daughters excluded their remoter agnates by God's special law; *Numbers, cap.* XXVII.

This being advised on the 28th of June; after they had near consumed the whole forenoon, the Lords recommended to the President and Carse to endeavour to settle the parties. *Vide* 5th July 1687. *Vol. I. Page* 458.

1687. *July* 5.—The heirs of line of Carnock, mentioned 22d June 1687, upon a bill obtain a warrant to transmit the charter-chest to the hands of the clerk of process. This was to inspect if they could find the act of curatory there. And, on the 12th of July, it being proposed that the Lords would advise the process, in regard the Lords to whom it was recommended could not agree them; the Chancellor produced a letter from the King, sisting that process, till he considered how far he had interest therein; for he had procured a gift of that estate to Drummond of Machany, his brother-in-law, as devolved in the King's hands *tanquam ultimus hæres*, by the conception of the minute of the contract of marriage, where the last termination is on the heirs-male of that Sir Thomas's body, who are now failed in the last Lord Napier.—But it was

thought this was no *ultimus hæres*, seeing infeftment never followed on that contract. *Vol. I. Page* 463.

1687. *July* 6. JOHN BALLANTINE *against* GRAHAM'S CREDITORS.

JOHN Ballantine, in the King's Guard, a papist, his reduction against the creditors of Provost Graham in Dumfries, is debated *in præsentia*. ALLEGED, —He could not reduce their rights *ex capite inhibitionis*, because they had right to a recognition of the lands by Provost Graham's taking base infeftment therein when he was breaking; and though the Act of Parliament 1686 does statute that inhibitions shall not be prejudged by recognitions, yet that is but *lex nova*; and the law before that was, that the grounds of the recognition could not be quarrelled by anterior inhibitions, the King not being concerned therein; and it was so found *supra*, 16*th December* 1680, *Hay*. ANSWERED, —The cases differed; for, 1*mo*, This inhibition was not against Graham, who incurred the recognition, but against M'Brair his author. 2*do*, Before the recognition, the pursuer had raised a reduction *ex capite inhibitionis*, and so *res erat litigiosa;* and there are none in his circumstances, and so no hazard of a preparative; and the Act of Parliament clears it *pro futuro*.

On the 7th of July, the Lords, on the specialties of the case, reduced, *ex capite inhibitionis*.

Then it was alleged, his bonds were null, being subscribed at several places, and there were only two witnesses for all. 2*do*, By this inhibition, he had received partial payments from sundry other creditors whose rights he had quarrelled. *Vol. I. Page* 464.

1687. *July* 8. DALMAHOY *against* ———.

IN the case of Mr Dalmahoy, married to the Lady Lufnes, it was debated, whether his son could have a moveable heirship, seeing he was neither prelate, baron, nor burgess, but had only some heritable bond by secluding executors, and was a *civis honorarius* by having some burgess tickets. But I find Stair, *tit.* 27, § 9, adduces decisions where neither of thir two were found sufficient to give heirship. *Vol. I. Page* 464.

1687. *July* 8. ANENT the PRIVILEGE of JOINTURES.

IT has long passed among lawyers as a brocard, that wives' jointures have a privilege; and therefore the Commissaries prefer them *in mobilibus*, (for, in heritage, diligence carried it,) when they seek to be confirmed executors-cre-

ditors to their husbands on their contracts of marriage, to the exclusion of other creditors.

The Lords are now beginning to doubt of the legality of this, our law giving no *hypotheca pro dote vel donatione propter nuptias ;* and therefore have appointed it to be heard in their own presence, in the case between the *Earl of Forfar* and one *Menzies*, the relict of one of his tenants, that they may examine it fully. *Vide* 17*th February* 1688, *Keith.* *Vol. I. Page* 465.

1684, 1685, *and* 1687. HEPBURN of HUMBY'S CREDITORS competing.

1684. *December* 10.—SOMERVELL of Drum against Adam Hepburn of Humby, is reported by Harcus. Humby being debtor to Drum's grandchild, by George Graham's daughter, they arrest the price of Crighton sold by Humby, in Sir William Primrose's hand. He ALLEGES,—That he had raised a multiplepoinding, wherein he had called all Humby's creditors to debate their rights; and the infeftments, and other diligences, are all ranked, and the price of the lands is exhausted, and destinated already for payment of other creditors. ANSWERED,—That was only done by collusion; and he could not gratify and prefer one to another, who was preferable in diligence.

The Lords ordained Sir William to depone *quomodo* the price was exhausted and applied, and what was yet in his hands unpaid. *Vide* 9th December 1685. *Vol. I. Page* 319.

1685. *December* 9.—Between David Hepburn of Randerston, and the creditors of his brother Humby. When Humby sold the barony of Creighton to Sir William Primrose, there was a destination of the application of the price (anent which, *vide* 10th December 1684,) drawn up by umquhile Sir John Cunninghame, and Sir Robert Hepburn of Keith, appointing the price to be paid to particular creditors therein mentioned, whereof some were but personal creditors: and Randerston, on the faith of the destination, having paid them, and others having arrested the price, and the competition arising betwixt them; the Lords found, as Humby could not sell the lands without consent of his interdictors, so neither could he prefer one to another; and therefore found the arresters preferable to these personal creditors named in the destination. And though it was offered to be proven by famous witnesses, that the disposition was only depositated in Sir John Cunninghame's hands in those terms, till the creditors in the destination were paid, yet, he being dead, they found it only probable *scripto vel juramento.* *Vol. I. Page* 383.

1687. *July* 8. In the competition betwixt the deceased Adam Hepburne of Humby's Creditors anent the price of the barony of Creighton, sold by him to Sir William Primrose, as mentioned 9th December 1685, Patrick Murray of Livingston, his son-in-law, is preferred on his Lady's right on that estate for 35,000 merks; and, on Carse's report, the Lords find her restricting her infeftment, which affected both the lands of Creighton and Humby, to the lands of Humby only, as also her restricting the sum to 30,000 merks, by accepting a

bond of provision for that lesser sum, is a lesion; and therefore sustained her revocation and reduction, and reduced; and declare her infeftment is a real right burdening the lands of Creighton, and therefore preferred her to Somervil the arrester, on the sums resting by Sir William Primrose, for the price of the lands of Creighton. And find that Penman's right to the acres possessed by him is an incumbrance on the lands, and ought to be purged; and that Sir William the defender ought to have the writs of the lands delivered to him; but that he ought to pursue for the possession of these acres, and the recovery of the writs, both against the representatives of Humby and of Sir John Cunningham, betwixt and the 1st of November next. And in the mean time allow him retention of the price of the lands. *Vol. I. Page* 465.

1687. *July* 8. JOHN CHARTERIS *against* JOHN SMITH, &c., Winram's Creditors.

THE case between John Charteris, merchant in Edinburgh, and Mr John Smith and the other Creditors of Mr James Winram, advocate, being reported by Redford; the Lords preferred the disposition to the apprising, and repelled that nullity of the infeftment, that it proceeded on hesp and staple, (not holding *more burgali*;) their infeftment proceeding in the same way, and so labouring under the same vice. And, as for the gift of escheat, it was alleged, the horning was null, there being a signeted suspension before the denunciation. *Vol. I. Page* 465.

1687. *July* 9. The KING'S SOLICITORS *against* BRODY of LETHEM.

THE King's Solicitors having raised a summons of adjudication against Brody of Lethem for 60,000 merks of fine, for his Lady's conventicles, &c.; and it being given out to Mr James Falconer to see for him, on the 7th day after, his two men are imprisoned for refusing to give it back; and it being returned, and immediately called, it was ALLEGED,—It had not the privilege of the King's causes, of summary discussing, but was gifted in my Lord Preston's name, for the use of the two Popish Colleges of Doway and Paris. This was repelled, because the gift was not passed the seals. Then he offered land to the value; which was also refused, because it was imprisoned with liferents.

This adjudication, being for a fine, has but a reversion of one year, by the 26th Act of Parliament 1685. This was *causa religionis* that dispensed with all this precipitation. *Vol. I. Page* 465.

1687. *July* 12. JOHN HAMILTON of FARM *against* The TOWN of HAMILTON.

JOHN Hamilton of Farm pursues the Town-Council of Hamilton on this ground, That Archibald Williamson, merchant in Edinburgh, had, in a subsidiary action, got a decreet against him for the escape of Mr John Bailie of Carfin out of their Tolbooth, though it was by no deed of his, but by James Hamilton his conjunct bailie, as appeared by the depositions of the witnesses: and therefore he convened the Town-Council of Hamilton to pay the debt, and to relieve him, for their electing the said James, who was a known bankrupt at that time, *super hoc medio*, that, they being vested with a power of delegation, they must be answerable for their deputes, and their delinquencies, by the 6th Act Parl. 1424, and *l.* 11, 12. *et seq. D. ad Municipalem.* And Perezius, *ad tit. C. De Periculo Nominatorum, et quo quisque ordine conveniatur*, shows that magistrates of cities, naming their successors, *ex eâ creatione tenentur, si nominent inidoneos successores;* even as they were liable; *et litem suam faciebant*, if they accepted insufficient tutors or cautioners; *tit. Dig. de Magistrat. Conven.* And if the representatives of a Town be discussed for a debt, and are unable, then the burgesses become liable.

ANSWERED,—This was a novelty, *et noxa caput sequitur, et pœna suos tantum auctores tenet;* and the Council are *functi officio* after election; and the relief never extended further than against that colleague who malversed.

The Lords were straitened (though the action was just;) and therefore, on Castlehill's report, they refused to sustain process against the Town-Council *super eo medio* as electors, from whom the bailies derived all their power.

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1687. *July* 13. HADDINGTON'S TUTORS *against* WALTER RIGG, Minister at ATHELSTANFORD.

AT the Commission for Plantation of Kirks, the Earl of Haddington's Tutors pursue a reduction against Mr Walter Rigg, minister at Athelstanford, of a decreet of augmentation obtained by his predecessor in 1649 and 1650, in regard Mr William Carmichael, the last minister, consented in 1674 to take the cure, but to exact no stipend out of these lands, because they paid already to the minister of Haddington.

The Lords of the Commission found that his consent was but personal, and could not prejudge the church nor the successors; and therefore decerned for the augmentation.

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1686 *and* 1687. ROBERT MILN of BARNTON *against* The EARL of ANNANDALE and the Other CREDITORS of ALEXANDER and WILLIAM HAMILTONS of BINNY, and HUGH SINCLAIR.

1686. *January* 8.—THE case between Robert Miln of Barnton, and the Earl of Annandale, and other Creditors of Hugh Sinclair of Binny being reported by Pitmedden; the Lords would not decide it; but gave their opinion, that if Hugh Sinclair's creditors quarrelled Mr John Drummond's decreet of preference to them in 1678, as collusive and of consent of Hugh Sinclair, then they would also loose it as to Barntoun, Mr John Drummond's assignee, and repone him to the benefit of the legal of Alexander Clarkson's apprising, which was restricted in that decreet; for it was unjust to keep him bound by that decreet, and yet to cast it loose to the creditors. *Vide* 30th March 1686.

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1686. *March* 30.—The Lords, after many hearings, having advised the debate between Miln of Barnton, and the other Creditors of Binny, mentioned 8th January 1686, they preferred Gavin Hamilton, upon his interest produced, to the lands of Inchmahan, not only for the debts and sums of money due by William Hamilton to Alexander Hamilton, sheriff-depute, at the time when he disponed Robert Stewart's apprising to William Hamilton, with a reservation of the said lands; but also for any other debts or sums of money which became thereafter due to the said Alexander Hamilton, sheriff-depute, by the said William Hamilton of Binny, and for which he did become obliged for him; and find, *quoad* Robert Stewart's comprising, though it was disponed to William Hamilton of Binny, against whom it was led, as lawfully charged to enter heir to his brother Alexander Hamilton, yet that does not extinguish the said comprising, but that it still subsists in the person of the said William Hamilton, and of Hugh Sinclair, and his creditors deriving right from him, at least as a security for the sums due on the said comprising. And find the disposition made by William Hamilton, in favours of Hugh Sinclair, of the lands of Binny, after the using of an inhibition against the said William Hamilton, at the instance of Clarkson, reducible *ex capite inhibitionis*. And find the apprisings acquired by Hugh Sinclair, of the estate of Binny, during the time he was factor for William Hamilton, redeemable at the instance of Sir Robert Miln of Barnton, for the sums truly paid out by Hugh Sinclair for acquiring the said apprisings; and allow the creditors' oaths to be taken, *ex officio*, from whom Hugh Sinclair acquired right to these comprisings, what were the sums he really depursed in acquiring thereof: though it was contended by Hugh Sinclair's creditors, that his being factor was not like a tutory to make these rights accresce to the constituent, but, at most, there was only a personal obligement on him to denude, which should not operate against them who were singular successors. And the Lords found the allegeance relevant against the haill apprisings standing in Hugh Sinclair's person, that they were satisfied by intromission with the rents of the lands or sums of money, or sale of lands belonging to Binny, within the years of the legal, *viz.* the intromissions to be proven *prout de jure*, and the sale of the lands to be proven *scripto* by pro-

duction of the dispositions. And repel the qualifications of trust condescended upon, that the apprising led at the instance of Robert Stewart, was, from the beginning, for the use and behoof of William Hamilton of Binny against whom it was led. And remit to the auditor to rank the creditors, and to discuss all the objections against the other particular rights produced. *Vide* 19th July 1687. *Vol. I. Page* 410.

1687. *July* 16.—In the case of Sir Robert Miln of Barnton against the Earl of Annandale, and other creditors of Alexander and William Hamiltons of Binny, and Hugh Sinclair, mentioned 30th March 1686, it was further ALLEGED, that Barnton, by a minute of contract with Hugh Sinclair, was bound to acquire his rights at 16 years' purchase; *ergo* he cannot obtrude the legal of Clarkson's apprising to exclude Hugh's creditors, nor use it farther than for security of the sums he gave for it.

ANSWERED,—1*mo*, The creditors must fulfil the minute, if they crave the benefit of it. 2*do*, It cannot accresce to the creditors; for the maxim, *jus superveniens auctori accrescit successori* holds only in voluntary rights, where an adequate price is paid, but not in the acquiring of diligences upon lands of a far greater value than the sum of the diligence. See Stair's Institutes, *tit.* 24. It was referred to Castlehill to hear both parties. *Vol. I. Page* 467.

1687. The MAGISTRATES of EDINBURGH *against* The FLESHERS and VINTNERS.

July 6.—The Magistrates of Edinburgh, on a general complaint of the extortion of the markets, having convened the Fleshers and Vintners before them, and on their declarations, (not on oath,) finding they had transgressed, had fined them: whereon they gave in a bill to the Lords, representing, where there is no law, there can be no transgression; and that there is no standard set for the price of vivers; and if they buy dear, they must sell accordingly. The Magistrates gave in an answer by way of bill, showing how the Fleshers do extortion, forestall, and regrate, by taking all the parks and inclosures about Edinburgh, so that they scarce suffer any to furnish but themselves; that it is notour they buy beasts as cheap as ever; that they cheat us by blowing their meat, and render it unwholesome, to make it seem fat; that they make the Act of Parliament 1681, for selling by weight, impracticable, by the trick of casting in bad pieces, and bones not belonging to the piece bought: That the Vintners do not observe the printed prices and table of wild fowl, in buying them from the poultrymen, but give what they crave, and exact triple again; and have them so bound up, that, till they be served, the private families and burgesses can get nothing; that they buy prohibited bread, neither of weight nor fineness conform to the standard, and get a dozen for 8 pence, which they sell at 12 pence; and in sugar, they take at the rate of 24 pence for the pound, which stands them but 8 pence; and yet they make up their ounces so small that they lose nothing of their 16 ounces: and even so in their measure of tobacco, &c.: and if the Lords liberated them from their

fines, the Magistrates will notice them no more: and the fines come not to their use, but to the poor.

It was referred to Carse; who having reported it on the 29th of July, the Lords refused the Fleshers and Vintners' bills, and remitted them back to the Magistrates of Edinburgh, whose procedure they approved. *Vide* 19th July 1687. *Vol. I. Page* 464.

July 16.—The Privy Council allows the landwert Fleshers to bring in their meat to Edinburgh all the days of the week, and that the Town appoint them slaughter-houses at the North-loch side; and discharges the Town, or the Edinburgh Fleshers, to exact any imposition from them. This, on the matter, dissolves the Fleshers of Edinburgh's seal of cause from being a deaconry, or corporation. And some think the Baxters' seal should be also cassed and annulled, and all permitted to bring in bread every day; as the Maltmen are discharged to incorporate into a deaconry. See Acts 121 and 122, Parl. 1540. *Vol. I. Page* 467.

1687. *July* 20. GEORGE GORDON and SIR JAMES DICK *against* RIGG of CARBERRY.

GEORGE Gordon and Sir James Dick of Priestfield, his tutor, against Rigg, lately of Carberry. The Lords, on Carse's report, find the resolutive clause and irritancy was not adjected to the clause *de non alienando*, but to that for not payment of the feu-duty. But, notwithstanding that the term assigned is already elapsed, for proving that a great sum was given for the composition *eo nomine*, that the right was burdened with an irritant clause *de non alienando, ad redimendam vexationem*, allow the defender to adduce his witnesses, and to prove the same betwixt and Tuesday next; and, in the mean time, supersede extracting. And declare they will allow what shall be proven in manner foresaid. *Vol. I. Page* 468.

1687. FOTHRINGHAME of POURY *against* GRAHAM of CLAVERS, NORTHESK, and PANMUIRE.

June 10.—FOTHRINGHAME of Poury gives in a bill against General Graham of Clavers, alleging he had violently stopped his possession of some assize fish due to him by the infeftments in Brughty Castle when Lord Gray had it, *viz.* nine fish out of every boat, for their liberty of anchoring on the rocks there in storms, and to gather bait; which one infeft in wair may hinder any to do on his sands. See Skeen, *de Verb. Significat. voce Wair.*

The Lords ordained Poury to condescend on the deeds of violence. But he was not able, farther than that Clavers had discharged his own tenants to pay it; which he might do: but, as chief magistrate and constable of Dundee, he allowed the fishers in the market to refuse him payment.

The Lords discharged Clavers to stop him in his possession, seeing *turbatus et spoliatus est ante omnia restituendus;* but found Poury could not bring in the point of right to be discussed summarily on a bill, unless Clavers consented, who was just going for London. And, seeing some of the fishers had suspended, and others had advocated, they ordained the cause to be brought in in common form, on the discussing of these, or by a declarator. *Vide* 21st July 1687. *Vol. I. Page* 455.

July 21.—Fothringham of Poury's case against Northesk, Panmuire, and Clavers, mentioned 10th June 1687, was reported by Edmonston; and the Lords find his charter *cum piscibus* gives him a sufficient right and title to prescribe the assize-duty of nine fishes out of every boat that passes by Brughty-castle, once belonging to the Lord Gray, for their anchoring on the rock, and gathering bait on his sands, if so be he had possessed 40 years by virtue of that title: though it was ALLEGED,—1*mo*, The clause, *cum piscibus*, was no more than *cum piscationibus*, a mere liberty to fish. But if it had meant a duty out of other folks' boats, it would have been so conceived. 2*do*, This cannot introduce a servitude upon my lands and tenants, not being exacted on the land, but at sea; and so the master's knowledge *et patientia*, to induce prescription, cannot be here presumed.

As for Clavers, he was 17 years of these 40 a minor, and so they must prove 40 years before that; likeas there were other interruptions.

Poury was ordained to produce his charters. *Vol. I. Page* 468.

1687. *July* 21. JAMES NICOLSON *against* SIR JAMES DICK.

JAMES Nicolson, bailie of Edinburgh, as assignee by Sir William Nicolson, pursues Sir James Dick, to count upon a ticket given by him to Sir John Nicolson, not to deliver up an assignation, made by the co-partners of the customs, to Captain Andrew Dick, till all was cleared with (and then follows his subscription,) "James Dick." ALLEGED,—This imported no more but till all was cleared with himself, being cash-keeper, and no ways relates to the other co-partners. 2*do*, Sir William Nicolson was furious when this assignation was granted.

The Lords, on Saline's report, sustained Bailie Nicolson's title, Dick of Grange (for whose behoof Sir William Nicolson pursued it,) concurring with him; and found Sir James Dick's ticket implied an obligement on him to count to the co-partners; and therefore ordained him to exhibit his count-books on oath, and to count to them for the effects of that assignation which he acquired from Captain Dick. But he alleged, he was only to count for £42,000 Scots, which was the roup at which these effects were then valued.

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1687. *July* 23. GEORGE MARISHALL *against* ALEXANDER CRUIKSHANK.

IN a case between George Marishall, tailor in the Canongate, and Alexander Cruikshank, about the liferent-escheat of Mr Andrew Burnet of Wariston, advocate, it fell to be queried, whether a creditor, who has inhibited before the bond whereon the liferent-escheat falls, can reduce the said ground of the horning, so as to be preferred to the donatar. It was alleged, the King, *quoad* his casualties, was founded *in jure communi*, and was not concerned in the diligences of creditors; and, till the late Act of Parliament in 1686, inhibitions did not prejudge recognitions. But, in equity, the creditor-inhibiter seems preferable. *Vol. I. Page* 469.

1687. *July* 23. ANENT OBJECTIONS to WITNESSES.

ONE gives in a bill, representing some legal objections he had against witnesses who were adduced against him, and which he could not instantly prove; and therefore craved a diligence for leading witnesses, who would not ultroneously appear to prove his objections.

The Lords granted a diligence; though these objections used to be summarily and instantly verified by the parties' oaths, or otherwise.

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1687. *July* 23. AUCHINLECK of BALMANNO *against* SIR THOMAS MURRAY of GLENDOIK.

AUCHINLECK of Balmanno's process against Sir Thomas Murray of Glendoik was advised, whether the commoners between them should be examined as to the terms of the bargain of sale, and the price, as was done in the Duchess of Lauderdale's case against the Earl of Lauderdale.

The Lords were equally divided on it, and the Chancellor superseded to give his vote, but sent for the commoners, and tried what they could say.

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1687. *July* 23. ELIES of ELIESTON, Petitioner.

MR John Elies having infeft his son in Elieston, to be holden base of himself, and being now dead, and so his son succeeding also to him as heir of tailyie, and serving himself heir; he doubted how to be infeft, being both superior and vassal, and if he could direct precepts to infeft himself.

On a bill given in to the Lords, they directed precepts to the Sheriff of the

shire to infeft him. But thereafter the Lords found he needed no new infeftment, but that his old one reconvalesced, and his retour consolidated the property with the superiority without a seasine. *Vol. I. Page* 470.

1686 *and* 1687. The EARL of SOUTHESK *against* SIR JOHN SINCLAIR of LOCHEND and the EARL of BROADALBINE.

1686. *March* 3.—THE case of the Earl of Southesk against the Earl of Broadalbine and Sir John Sinclair of Lochend, being reported by Kemnay; the Lords repelled the first allegeance proponed for Sir John, *viz.* that his father's back-bond is not produced, in respect of the reply that Sir John's father accepted of Broadalbine's back-bond, which was recovered out of Sir John's own hands by an exhibition before the sheriff. And, as to the other allegeance against the relevancy of the summons, the Lords declared they will hear the parties' procurators thereupon *in præsentia*; for it was alleged, that Broadalbine's back-bond, mentioning Sir Robert Sinclair's back-bond, did not prove, unless Sir Robert's back-bond were produced, *quia non creditur referenti nisi constat de relato, et falsa causa seu demonstratio non nocet*; as if I should leave Titius £100, because he procured me such a gift from his Majesty, and find afterwards it was not he, but another, he cannot claim it. Yet, here, the Lords found it sufficient, *quia verba narrativa fidem faciunt contra proferentem et acceptantem.*

And, on a new hearing on the 17th of March, the Lords found Broadalbine's back-bond instructed against Sir Robert and Sir John Sinclair, but not against Broadalbine, till Sir Robert's back-bond were produced. *Vide* 25th November 1686. *Vol. I. Page* 407.

1686. *November* 25.—The case of the Earl of Southesk and Sir John Sinclair, mentioned 3d March 1686, was heard in presence. It was ALLEGED,—That the clause in Sir Robert Sinclair's back-bond to the Earl of Caithness, that, he being paid and Walter Innes of Orton relieved, he should denude, did not tie him to see Orton paid, but was of the nature of a perpetual reversion, and that he should not transmit it without the burden of Orton's debt; which he had done; but did not hinder him to take payment to himself. ANSWERED,—The clause was copulative, and could have no sense, but would be frustraneous and elusory, unless it had been a security for Orton, who, by relying on this, having forborne to do diligence, or to comprise, must not be prejudged; and that the nicety of the Roman law, *quod non licet alteri stipulari*, (which was introduced *ut unusquisque sibi acquirat, non alteri,*) was abrogated by the equity of the canon law and our customs; whereby clauses might be inserted in favours of a third party, though not a contractor.

The Lords having advised this debate, on the 10th of December, they repelled the allegeance proponed against the pursuer's title, though this relief was not *expressim* comprised; *omne jus* in general being enough. And found, that the comprising led against Innes of Orton gave Southesk sufficient interest to insist in this process; but find that Sir Robert Sinclair's disponing the right

of the adjudication, with the burden of his back-bond, was no contravention of his back-bond; and therefore assoilyied Sir John Sinclair, reserving action to the pursuer against the Earl of Broadalbine, as accords. See this altered 17th Feb. 1687. *Vol. I. Page* 430.

1687. *February* 17.—Earl of Southesk against Sir John Sinclair, mentioned 25th November 1686. The Lords now find Sir Robert Sinclair had contravened his back-bond in favours of Orton, by subscribing the articles where Orton is left out; and therefore decerned against him. *Vide* 12th July 1687. *Vol. I. Page* 448.

1687. *July* 12.—The Lords advised the Earl of Southesk's pursuit against Sir John Sinclair, mentioned 17th Feb. 1687; and, in regard the adjudication on Caithness's estate, and the comprising, were for different sums, the President and Lords were for assoilyieing Sir John; but however it was carried, to gratify Southesk, that, before answer to the debate, both Southesk and Sir John should, in this same process, insist against the Earl of Broadalbine, to make the debt real upon the estate of Caithness, notwithstanding it was adjudged from Broadalbine by his creditors. But they were not here *in campo*, nor called. *Vide* 26th July 1687. *Vol. I. Page* 465.

1687. *July* 26.—Sir John Sinclair and the Earl of Southesk having insisted, in their declarator against the Earl of Broadalbine, on his back-bond, as mentioned 12th July 1687, and that the real right of Caithness was affected with it, and with Innes of Orton's debt, and the property transmitted with that burden; the Lords declared in terms of the libel, Broadalbine's lawyers declining to answer. But afterwards, on a bill, this was stopt. *Vol. I. Page* 470.

1687. *July 27.* The Duke of Hamilton *against* ———.

Duke Hamilton pursuing for non-entry, he alleged that he had a precept of *clare constat* and seasine thereon; but they were lost.

The Lords, before answer, ordained the notary and witnesses to be examined thereon, if they truly gave the seasine, to the effect they might consider if it should stop the non-entry. *Vol. I. Page* 470.

1687. *July 27.* Robert Malloch *against* John Inglis.

John Inglis, advocate, having caused print the process betwixt him and Robert Malloch, wherein he brands him as a cheat and falsery; Robert gave in a bill to the Lords, complaining of the abuse and defamation.

The Lords called for John Inglis to give him a reprimand, and to cause him crave Malloch pardon; and, in regard he absented, they ordained him to be apprehended and imprisoned, and deprived him of his office as an advocate. *Vol. I. Page* 471.

1687. *July* 27. ALEXANDER YEOMAN *against* His CURATORS.

ALEXANDER Yeoman gives in a bill, representing, that, though he had an opulent fortune of 100,000 merks, all that his curators allowed him when he was at schools and colleges, was 1000 merks by year; and that now, being within two years of his majority, he was to improve himself in such qualities as suited a gentleman, and resolved to travel abroad; and therefore craved the Lords would authorise his curators to advance him money, keeping within the annual-rent of his stock, for preventing his borrowing of money, or otherwise contracting debt with merchants, &c. who would not refuse him ware; which drives minors to unfrugal courses, against which the *S. C. Macedonianum* was made.

The Lords ordained the curators to give him 2000 merks *per annum* while he staid within the country, and, when he went abroad, 3600 merks; and this act was designed for their warrant. *Vol. I. Page* 471.

1687. *July* 27. SMART *against* HYSLOPS and SIR WILLIAM SHARP.

THE case of Smart in Fisheraw against Hyslops in Mountainhall and Sir William Sharp, being reported by Saline; the Lords sustained the declarator that the bond, granted by umquhile Sir William Sharp to the Hyslops, came in place of a former bond granted by him to their father, and which was assigned by him to them, and was expressly burdened with 500 merks payable by him to the pursuer Smart, his oye, and that therefore it ought to be burdened in the same manner; and therefore declare, and prefer the pursuer, as to the said sum to the creditors of Richard Hyslop, arresters of this debt, being *in græmio* of Richard's own right. *Vol. I. Page* 471.

1687. *July* 29. The DUKE of HAMILTON *against* WILLIAM LAURIE, Tutor of Blackwood.

DUKE Hamilton (who took up much of the people's time with his causes,) pursues William Laurie, tutor of Blackwood, for his teinds. He ALLEGED, By a contract with the Marchioness of Hamilton, they were rentalled to 40 bolls, and he had obtained a valuation of a sub-committee thereon. ANSWERED, —He bruiked not by that; but, conform to his bond in 1653 to the present Duchess, he had acknowledged that he bruiked by a disposition thereof from Duke William, which he had vitiated.

REPLIED,—Offered to prove, by the Duchess and Duke's oaths of calumny, that this bond was but in trust, to exclude the sequestrators. DUPLIED,—This was *factum alienum* to the Duke, and so he could not depone thereon (not being then married to her;) and he would not suffer his Lady to depone to his prejudice.

TRIPLIED,—Her oath was craved, not to constitute a debt on her husband, but to liberate from one.

The Lords, on Tarbet's report, ordained them both jointly to give their oaths of calumny; at which the Duke, being dissatisfied, procured it to be heard in presence. *Vol. I. Page 472.*

1687. *July* 29. The CHANCELLOR *against* JOHN BALLANTINE.

THE Chancellor pursues John Ballantine, keeper of the advocates' bar, for the maills and duties of some lands. He defends on a charter and seasine from the late Argyle. ALLEGED,—It was depositated, and Sir Colin Campbell of Arbruchel has, on oath, declared the terms, and that the Earl had recalled it. ANSWERED,—It did not appear that Sir Colin was depositary, (which ought to have been first proven;) and his charter and seasine could not be taken away by a single testimony, but by his own oath or writ, he being in possession by virtue thereof.

Yet the Lords found the charter was only a depositated evident; and annulled the seasine. *Vol. I. Page 472.*

1687. *July* 29. CHARLES HOME of AYTONE and SIR WILLIAM PURVES *against* JAMES KEITH.

See the prior parts of the Report of this case, Dictionary, pages 13,253, 9,500, and 354.

MR Charles Home, of Aytone, as having right, from Sir William Purves, his father-in-law, to that debt owing by the Earl of Marishall, (mentioned 20th December 1683,) insists against Mr James Keith, writer; and it was debated this day. *Vol. I. Page 472.*

1687. *July* 29. LAUDER, &c. *against* TROTTERS.

COLIN Lauder, George Mosman, and William Paton, their bill against Janet Trotter was read, craving up the goods disponed by her since she had taken a *cessio bonorum* on her consigning the said disposition, and that she ought not *lucrari* by retaining these goods.

The Lords ordained her to be pursued by way of action.

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1687. *November 5.* ANENT PROOF of PAYMENT of a BOND.

The Lords refused to allow, for taking away a double bond conceived in the English form, but made amongst Scotsmen, to prove payment thereof by witnesses, but only *scripto vel juramento*; though, by the English law, payment may be proven by witnesses, and we had followed their custom *quoad* such bonds in our former Decisions, as appears by *M'Morland's case*, the *28th of June* 1668, in Stair's Institut. *tit.* 1. *Vol. I. Page 475.*

1687. JAMES CHIESLY and LOWIS of MERCHISTON *against* The EARL of WINTON.

June 30.—JAMES Chiesly and Lowis of Merchiston, as creditors to James Inglis in Seton, pursue the Earl of Winton, by a subsidiary action, to pay the debt; because he being required, as Sheriff of East-Lothian, to apprehend the said James, who was alleged to be within his own house then, he delayed, and shifted the messenger who came to search, and caused close the gates on him; by which means he gave the rebel an opportunity to escape. ALLEGED,—The Earl did not refuse concourse, but allowed him to go through the rooms after the doors were opened, they being shut the time of the Earl's dinner; *et non relevat* (*esto* he were in the house,) unless the Earl knew it.

The Lords, on Kemnay's report, found the libel relevant, and admitted it to probation, especially that part of it, that the rebel was in the Earl's house at the time the concourse was sought.

A bill was given in against this, showing, the Sheriff was a gratuitous officer, and not bound to go along himself; and that all the Sheriffs of Scotland were concerned in the preparative: and craved a joint probation on the particular facts alleged on either side.

And the Lords having advised it on the 20th of July, they, before answer, allow the pursuer to prove his libel, and the verity of his execution of caption, and that the rebel was *de facto* within the Earl's dwelling-house the time the messenger gave the charge: as also allow the Earl defender to prove, that, immediately after he got the charge, he gave access to the messenger to search, and that, *de facto*, he did search all the rooms he pleased, and was not debarred by the Earl or his servants to search any room in or about his house; but refused to allow the Earl to depone upon his knowledge, whether the rebel was within the house or not. *Vide* 8th November 1687. *Vol. I. Page 461.*

November 8.—James Chiesly and Merchiston having omitted to take out their diligence in the subsidiary action against the Lord Winton, as mentioned 30th June 1687, they get it prorogated on a bill till the 22d of this month, seeing the other probation was not closed yet, and so did not retard the advising. *Vol. I. Page 475.*

1687. *November* 8. Sir William Sharp of Scotscraig *against* Lord Sinclair and His Lady.

Sir William Sharp of Scotscraig pursues the Lord Sinclair and his Lady, for restitution of some silver-plate and jewels which were in Sir William his uncle's possession a little before his death, *rei vindicatione*. Their defence was, that they were gifted. And both the libel and defence were admitted to probation. They had likewise a disposition to them from Sir William; but they did not make use of it, because it was holograph, and did not astruct its own date, and so was presumed as granted *in lecto*, which would make it only sustain as a legacy, which was not so safe for my Lord; because, though there was no legitim due here, (old Sir William wanting bairns,) yet he having moveable debts that would more than exhaust it, these would be preferred to this legacy.

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1687. *November* 9. John Inglis, Factor for Street and Jackson, *against* John Forrest.

Was debated the cause of John Inglis, advocate, as factor for Street and Jackson, English merchants, (who, in 1674, obtained decreet against Mason,) for improving a false charge of horning made by John Forrest, writer, now in prison upon the suspicion of this forgery, and given without any letters of horning or other preceding warrant, only to fear the tenants of these lands beside Calder. Forrest pretended John Inglis had done it himself, and had caused write the letter to the messenger, and yet laid it all in his name.

But, on the 6th July 1688, the Lords found him guilty on the presumptions; and at last he confessed it. *Vol. I. Page 475.*

1687. *November* 9. John Bayn, Petitioner.

James, late Earl of Home, having deprived John Bayn, Sheriff-clerk of the Merse, from his office, in September last, a little before his death, on this ground, that he had registrate a bond in his sheriff-court books, though the debtor lived not in his shire, but in England; and, by the Act of Parliament 1685, to registrate writs incompetently is deprivation, and a fine of 500 merks; though he alledged for himself that the bond designed the debtor, now in Coldstream; but that was found to be interlined, and a mockery, for he was not dwelling there, but only drinking in the town at that time, which made it not *forum competens* to him:

John gives in a bill to the Lords, representing how summarily and unjustly he was thrust out from his office; and craving to be repossessed.

Some of the Lords were for sequestrating the profits of the place during the dependence, and till the discussing the suspension and reduction of the decreet. But it was carried to repone him, he finding caution to refund these emoluments if he succumbed. Then they offered to give in additional articles of malversation against him: and he, to secure himself, was getting a new gift of his office from Secretary Melfort. Yet see Sande, *Decis. Fris. lib. ult. tit. ult.*

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1687. *November* 11. DAVID MAYN *against* The EARL of MARISHALL.

MR David Mayn pursues the Earl of Marishall for payment of a debt of his brother's, upon this head, That, by the 62d Act of Parliament 1661, an apparent heir buying in comprisings, or other rights, on his predecessor's estate, they may be redeemed from him within ten years after the acquisition, for payment of what he gave; and he offered to pay him. And the Earl having deponed on the onerous cause, he declared it was disponed to him by Keith of Whiteridge for a bond he gave him of 200,000 merks, as the price thereof.

The Lords thought this so great a sum that they suspected it to be simulated; and therefore ordained the Earl to be reëxamined, if he truly paid that price for acquiring the said first apprising, and what he really gave for it.

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1687. *November* 12. HOME of BLACKADER *against* SIR JAMES COCKBURN.

IN a case between Home of Blackader and Sir James Cockburn, it occurred to be debated, if three consecutive discharges given by a factor import liberation of all preceedings, like the *apochæ trium annorum* when granted *a domino*.

The Lords demurred on it; for there were two decisions alleged in the negative, in 1667 and 1682. See Stair's *Institut. tit.* 11. *Vol. I. Page* 478.

1687. *November* 12. The COMMISSARY of DUNKELD *against* SIR THOMAS DALZIEL of BINNS.

SIR Thomas Dalziel of Binns being charged to confirm his father, General Dalziel's testament, by the Commissary of Dunkeld, within whose diocese Binns lies, and where his domicile was when he died, though he deceased in Edinburgh:—the competition arose between Bruce the former Bishop of Dunkeld, and his Commissary, (in whose time he died, but Sir Thomas was not charged to confirm before his deprivation,) and Hamilton the present

Bishop of Dunkeld, and Mr George Pitcairn his Commissary, admitted upon the death of the former. See Stair, *6th July* 1676, *Wisheart.*

Sir Thomas ALLEGED, against them all, absolvitor; because the General had disponed all in his lifetime, and instruments of possession were taken thereon; and so there were no confirmable goods. ANSWERED,—He had money lying in James Hay the writer's hands. REPLIED,—It was the price of lands bought before his death; and so it was not his money. *Vol. I. Page* 478.

1685 *and* 1687. The LORD YESTER and His CHILDREN *against* The EARL of LAUDERDALE.

See the other parts of the Report of this case, pointed out in the Index to the Decisions.

1685. *March* 31.—THE Lord Yester and his Children gave in a bill against Lauderdale, that they intended to adjudge the *hæreditas jacens* of the deceased John Duke of Lauderdale, for the uncontroverted £7000 sterling, on the renunciation to be heir, before the Sheriff, or other Judge Ordinary; and craving that the Lords may discharge any advocation thereof to pass.

The Lords ordained, if any such bill were presented, especially in the vacance, that it should be first given up to Yester to see and answer.

It was doubted here, what Court would be *forum competens* to this adjudication. For though the Earl of Lauderdale, *ratione domicilii*, was liable to the Sheriff of Mid-Lothian, yet adjudication being *actio realis*, and none of the lands lying in that shire, except Duddiston, (which is disponed to the Duchess,)—for Musselburgh lying in a regality, it cannot be pursued there: and it was thought he could not be convened before the Sheriff of East-Lothian, or the Merse, for the bailiary of Lauderdale, because he dwells not there. But a citation on a supplement may make up and supply all that. *Vide* 24th November 1685.

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1687. *November* 16.—The Lord Yester gives in a bill against the Earl of Lauderdale, complaining that he wanted a year's annualrent of his sum of £7000 sterling contained in his adjudication, mentioned 31st March 1685. And therefore craved that the tenants might come in and depone what was in their hands; and that Sir William Sharp's factory from the Lords and creditors might be recalled, and another put in: and he offered to be cautioner for Mr John Buchanan.

The Lords refused the desire of his bill, in regard of this answer, that his adjudication being led in January last, there could not be a year's annual owing him till January; and that it were oppression to bring in 100 tenants: and therefore granted commission to the nearest judges to take their oaths at home.

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1687. *November* 16. Sir William Binning *against* Hope of Carse.

Sir William Binning, late Provost of Edinburgh, pursues Hope of Carse on the testament of Colonel Gordon, who died in Germany, and was the third who, with Lesly and Butler, killed Valston Duke of Fritland. Alleged,—This cause was *res hactenus judicata* in Holland, and the Lady Carse was assoilyied there. Answered,—The process there was upon its privilege, as being *testamentum militare;* and here it is not insisted on *super eo medio*, but as holograph; and it is certain that *res judicata* takes no place, except the two libels be both *super eodem medio*. And they cited Boeckleman, *de Action.* where he tells of one that had been *ter victus*, coming to him; and he caused him intent the right and genuine action, wherein he prevailed, though he had so often succumbed before.

The Lords having advised this on the 23d of November, they found the Lady Carse had shunned to exhibit these papers upon oath, and, to evade it, had retired out of the kingdom to Holland; and had assigned and conveyed her jointure, and all her effects, and particularly this right, to some confidant for her son's behoof; so that a sentence against her would be elusory, and frustraneous,—she being *extra regnum*, and having nothing to affect. Therefore, before answer, they ordained Carse, her son, betwixt and eight days, either to state himself as party, and *legitimus contradictor, et litem in se suscipere*, and to find caution *judicatum solvi*, or else they would instantly decern against her.

And, he having stated himself as party, they directed two commissions,—one to Holland, for her to depone anent the having, and to try if this defence was proponed there, to take off the *res judicata;* and the other directed to Lubeck, where the testament was made, to inquire if holograph testaments by their law be probative. The event of this process was of great importance, being upwards of 40,000 rixdollars; and Sir William, in journeys to Holland and in processes, had wared more than £1000 sterling in it.

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1686 *and* 1687. Scott of Harwood's Real Creditors *against* his Personal Creditors.

1686. *February* 19.—Scot of Harwood's Real Creditors, *viz.* Sir William Ker of Greenhead, &c. competing with Goldilands and his other Personal Creditors, or adjudgers, who craved the real Creditors' rights to be reduced, because granted to near relations by one *in meditatione fugæ*, though not under any diligence at the other creditors' instance; in so far as that, finding himself broken, he convened his friends, who were bound for him as cautioners, and discovered to them his condition, and gave them thir infeftments of relief amongst them, which eventually, and all conjoined together, prove to be a *dispositio omnium bonorum*, though granted at sundry times; which was an un-

warrantable gratification, prohibited by the Act of Parliament 1621. ANSWERED,—That act only takes place where creditors have done diligence; and here there is none; and the receivers are creditors for most onerous causes, *et sibi vigilarunt.*

The Lords, before answer, granted a mutual probation anent his condition the time of his granting thir dispositions, *viz.* if he was bankrupt, or holden and reputed solvent at that time; and if he convocated and gathered his friends together, and privily disclosed his case to them; for that made it a machination and contrivance, and them *participes fraudis.* *Vide* 18th Nov. 1687. *Vol. I. Page* 405.

1687. *November* 18.—The Lords advised the probation led between Scott of Goldilands, and the other Creditors of Scott of Harwood, and Sir William Ker of Greenhead, and the other real Creditors infefters, on the other hand, mentioned 19th February 1686; and assoilyied the real Creditors from the reduction on the Act of Parliament 1621, because, though they were the bankrupt's near relations, and amongst them had got dispositions *omnium bonorum*, and had prevented other diligences, yet the dispositions were but partial, and not granted all at one time; and he was not under horning and inhibition at the pursuer's instance; and no contrivance, machination, or concealment was proven; and it appeared he was then esteemed solvent, and got credit in the country, and was Sheriff-depute of Roxburgh at the time. *Vol. I. Page* 480.

1686 *and* 1687. PATRICK ARCHIBALD *against* ROBERT TURNBULL and BURN'S and NEILSON'S RELICTS.

1686. *March* 30.—PATRICK Archibald, factor in Bordeaux, against Robert Turnbull, merchant in Edinburgh, and Burn's and Neilson's Relicts. The Lords, on Forret's report, having advised the fitted account, and the merchants' report, they approved of George Galbraith's and Harry Joussie's report, except as to the goods sold to Oswald, which did come home after the merchant's death: as to which they only allow the price paid for the said goods by James Oswald; and ordain Jameson, who, as trustee, delivered the said goods to Oswald and Margaret Wallace, to order the payment of them to the pursuer; and decern the representatives of the said Alexander Burn and John Neilson to make payment to the pursuer of the respective sums, as the price of the wines he sent home to their husbands, as the same is stated in the above written report; and allow the pursuer to insist either before the Lords, or any inferior court, for proving the passive titles against them, as he thinks fit. *Vide* 22d June 1687. *Vol. I. Page* 412.

1687. *June* 22.—Patrick Archibald, factor at Bourdeaux, as donatar to the escheat of Burn and Neilson, to whom he had furnished wines, as mentioned 30th March 1686, pursues an improbation against Robert Turnbull, merchant in Edinburgh, of a disposition made to him by the said Burn and Neilson, on this ground, That though the disposition bears to be of a day's date prior to Burn's and Neilson's denunciation to the horn, at Rutherford's instance, on

which Archibald's gift of escheat proceeds, yet it is truly ante-dated, and made of this false date of purpose to defraud and evacuate the Fisk; as appears by the subscribed account to which the disposition is made relative, as its onerous cause, where Rutherford's article of debt is stated, and his assignation to the caption, on the 8th of January, and yet, by the caption and assignation produced, it appears they are not till the 10th of January.

ANSWERED,—This is but a mistake, and was so inserted in the account, because it was intended presently to be done, the parties having agreed. But if there had been an agreement, the caption needed not to have been taken out.

The Lords, on Carse's report, before answer, ordain the witnesses in the three dispositions and fitted account, and witnesses at the communings, to be examined anent the true dates of the said dispositions and fitted account, and anent what they knew was *actum et transactum* the time of subscribing, or at any other time anent the said matter, upon pertinent interrogatories to be given in by either party; and granted diligence for that effect. *Vide* 23d November 1687. *Vol. I. Page* 459.

1687. *November* 23.—The Lords having advised the probation betwixt Patrick Archibald and Robert Turnbull, in the case mentioned 22d June 1687; the Lords found the account not probative, and therefore that it cannot be sustained as the onerous cause of the disposition. For the Lords thought, that since the verity of the account was redargued in that particular of Rutherford's debt, *corruere debet tanquam falsum in toto.* Some were for remitting Turnbull to the criminal court; but the Lords found the account only not probative.

Turnbull gave in a bill, bearing, that he needed not say the account was the onerous cause of his two dispositions; because, having received the dispositions from a stranger, mentioning onerous causes, the narrative proved sufficiently without any thing farther. ANSWERED,—1*mo*, He had produced this account as the onerous cause of his disposition. 2*do*, The dispositions being *in lecto*, he could not then prejudge this pursuer and his other creditors by gratuitous dispositions; and so he must instruct the onerous cause wherein he was creditor. And Patrick offering to prove Turnbull paid, by the debit side of that account; it was alleged he could not use it, because he had quarrelled it, and it was found not probative.

The Lords having advised this, on Carse's report, upon the 14th of February 1688, they found that Robert Turnbull might astruct the onerous cause of the disposition by the bonds produced. And likewise found, that, albeit the fitted account produced by Robert Turnbull was found not probative, as being ante-dated, that Patrick Archibald might found upon and make use of the discharge contained in the same fitted account, for proving Robert Turnbull's intromissions with the sums therein mentioned; he adminiculating the same, either by Robert Turnbull's oath, or by witnesses, that Robert Turnbull did intromit with these sums. *Vol. I. Page* 482.

1687. *November* 23. JAMES GRAHAM *against* SAMUEL SOULTON.

THE Lords advised the probation in James Graham, bailie of Edinburgh, his process against Samuel Soulton and the other owners of the Calmar. He had transacted with one Chapman in Kirkaldy, for his part of that ship, and afterwards *viis et modis* he retired that discharge and cancelled it; and then pursued the other partners for his share, and before the Admiral gave an oath, which was alleged to be contradictory.

The Lords found the tenor of his discharge to Chapman proven, and the trust made out, and therefore assoilyied the defenders. *Vol. I. Page* 482.

1687. *November* 26. GRAY of BALBUNNOCH *against* GRAY.

THE case of Gray of Balbunnoch and Gray was advised. The Lords found the Earl of Strathmore was superior of the lands of Bulleon, and that there was no recognition thereof by the Lord Gray's deed; and therefore reduced the defender's rights. *Vol. I. Page* 483.

1687. *November* 29. The EARL of AIRLY *against* JOHN DEMPSTER of PITLEVER.

BALKASKIE reported the Earl of Airly's reduction of Mr John Dempster of Pitlever's rights of his lands of Balbugie, on an old comprising led in 1536, and which was prescribed; but Airly got an Act of Parl. in 1681, subducting 12 years in Cromwell's time from the prescription, as if Airly had been *non volens agere* then. ALLEGED,—The service and retour is after the summons, and his seasine is posterior to the very calling of it by the clerk, and so was *filius ante patrem*. ANSWERED,—This was good against singular titles, *v. g.* if one's assignation was after the summons; see Stair, 15*th November* 1666, *Abercrombie*. But, in an universal title as heir, it was drawn back, the service being founded on the *jus sanguinis*, and only declaratory of it.

The Lords refused to sustain process. *Vol. I. Page* 483.

1686 *and* 1687. DOCTOR WILLIAM ECCLES *against* SIR JAMES ANSTRUTHER'S HEIRS and JOHN WEDDERBURN.

1686. *November* 24.—MR William Eccles, doctor of medicine, his reduction and declarator against Sir James Anstruther's heirs, and Mr John Wedderburn of Blackness, clerk to the bills, is debated: and they clothing themselves with

the decreet-absolvitor from his gift, as *tuti exceptione rei judicatæ*; it was ANSWERED,—that was only *in possessorio*, which could not hinder his declarator of right *in petitorio*; and that *sententia debet esse conformis libello*; *et, ultra id quod in judicium deductum est, potestas judicis excedere non potest,—l.* 18 *D. Commun. Divid.*: and the mentioning of his title is of no moment, *quia titulus debuit allegari, ad colorandam possessionem*, that it was not *clam, vi, nec precario*. *2do*, Bartolus, *ad l.* 12 *D. de Acquir. et Om. Possess.* says, *In dubio*, whether the *petitorium* be cumulated as well as the *possessorium*, *standum est declarationi libellantis*; and here the conclusion of Mr Eccles's bill, which is the *regula regulans* of the whole bill, bore only restitution to the possession of his office till his right were quarrelled, and he heard on all his lawful defences; and that though he had no warrandice on the granter's heirs, yet, *per l.* 11, § *ult. de Act. Empt.*, *pretium est ei restituendum*, in case of eviction. But the President said to this, If one sell lands with warrandice only from his own fact and deed, if the distress and eviction arise *aliunde*, he will not be obliged to restore the price. It was likewise alleged, Mr Eccles was in *Mr Hary Oliphant's case*, (*vide 30th November* 1683,) by the quality of Sir James Anstruther's gift, which gave him the office not during his own, but during Sir William Bruce's lifetime. *Vide* 30th November 1686. *Vol. I. Page* 430.

1686. *November* 30.—The case of Eccles and Wedderburn, mentioned 24th current, was advised. The Lords having considered the petition given in by the said Mr William Eccles, and Blackness's answer, and the decreet-absolvitor following thereon, they found there was no more then under consideration but the possession; and that the point of right could not be thereby determined: and therefore reduced the said decreet, and reponed Dr Eccles against the same, and found his defences, as to the point of right, entire: but, as to his conclusion of declarator against the Register, Balcaskie, and the clerks of the bills, referred it to Forret and Carse to agree them, either by restoring him to his place, with the bygone profits, or giving him a sum of money for the same; and decerned against Sir John Anstruther's heirs in absence, none appearing for the minor. *Vide* 29th November 1687. *Vol. I. Page* 432.

1687. *November* 29.—The case of Dr Eccles against the Register and the Clerk of the Bills, mentioned 30th November 1686, was farther debated. The defenders ALLEGED,—1*mo*, The parcelling out and multiplying of new offices in the bill-chamber multiplied expenses, and extortioned the lieges. But this would put out James Sinclair, as well as the Doctor. *2do*, That Blackness was a singular successor, for he knew, before his entry, Mr Eccles's right. *3tio*, That the pursuer had lost his place by his not attendance; and though he had a license, from Sir James Anstruther, to go abroad and study, yet, so soon as he died, it expired, being *mandatum personale quod morte mandatoris extinguitur*; and he should instantly have returned home, which he did not: and for this non-attendance, Sir William Primrose was deprived from being clerk to the notaries: and they also cited *Commissary Fleming and Nimmo's case*, from Stair, 11*th July* 1672.

ANSWERED,—Sir James Anstruther's dispensation did not die with him; for his gift lasted all the days of Sir William Bruce's lifetime; and though residence be essential in offices, yet *Abbas Panormitanus, cap. extra, de Clericis*

non residentibus, requires two conditions: 1*mo*, That there be lesion and prejudice by the absence. 2*do*, That they be *moniti et requisiti revertere*: none of which can be subsumed here. And Sir William Primrose was not deposed for non-residence, but for not bringing in the notary's prothocal books, conform to the 22d Act Parl. 1617. And it is by the injunctions of the books of Sederunt that Commissaries must reside.

And yet this was not required by the decision, *6th February* 1666, *Archbishop of Glasgow* against *Logan*.

This case being submitted to the President, the Doctor got 2700 merks for his 4000, and the intermediate profits. *Vol. I. Page* 483.

1687. *November* 30. ERSKINE of ALVA and STIRLING of AIRDOCH *against* GEORGE RAMSAY.

THE case of Erskine of Alva and Stirling of Airdoch *against* Major George Ramsay, was reported by Kemnay. Sir Alexander Hope of Granton having given his Lady, Dame Anna Bill, a disposition to his moveables, it was quarrelled by thir legatars of Sir Alexander's, as *donatio inter virum et uxorem*, and revoked by his posterior testament leaving thir legacies. The Major, as assignee to the Lady, for fortifying it, offered to prove it depended on this onerous cause, that Sir Alexander got £2800 sterling of tocher with her, out of the Chamber of London. And a commission having been granted for proving it, the term was circumduced, and decreet given: which was suspended on this reason, that, the commission being directed in 1684, they could not then get it executed, because, the King having issued out his writ of *quo warranto* against the city of London's charter, it was declared void, by the Lord Chief-justice Sanders, and there was no access to their writs and archives; and so they were not *in culpa aut mora*; and it was only an act before answer. REPLIED, —The onerous cause was admitted only to be proven by a writ under Sir Alexander's own hand, and not by extrinsic records, as recognizances, and statute staple, which are not probative with us; but the Lords had reserved to themselves to consider what these should operate.

The Lords, on Kemnay's report, turned the decreet into a libel, and reponed the defenders, they paying £40 of expenses for that decreet; and renewed the commission to London, to be reported against the 10th of January next.

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1686 *and* 1687. ALEXANDER HAMILTON *against* SIR JOHN RAMSAY of WHITEHILL and DAVID PLENDERLEITH of BLYTH.

See the prior part of the Report of this case, Dictionary, page 16,404.

1686. *December* 17.—ALEXANDER Hamilton against Ramsay and Blyth,

mentioned 1st December 1686. The Lords, on a bill given in by the defenders, allowed Alexander the pursuer, in fortification of his writs, to prove that the defenders, their tenants, or authors, had been these 40 years bygone in use to come to his mill; and allowed the defenders to prove interruptions: for he did not condescend on the usual ways of constitution of thirlage; for their lands were not astricted by his charter *per expressum*; and their own charters did not mention any thirlage, but in the *tenendas* bore *cum molendinis et multuris*, though not in the dispositive part; and their feus from the Convent and Abbot of Newbottle were older than the feu of the mill; and he had no bond of thirlage, nor any acts, or rolls of Court, nor decreets against them for abstracting; but only pretended it was the mill of the barony, and he was in possession. The use to come to a mill is *meræ facultatis*; *et nunquam præscribit jus astrictionis* except *in molendino regio*; which some also extend, with Craig, to *ecclesiasticum*. *Vide* 1st December 1687. *Vol. I. Page* 438.

1687. *December* 1.—The probation led at Alexander Hamilton's instance, against Sir John Ramsay and David Plenderleith, as mentioned 17th December 1686, for proving their astriction to his mill, was debated; and the President was of opinion, that his rights of the mill from the Abbots of Newbottle not thirling expressly the lands of the barony, and their feus being prior, without any mention of astriction; they were not liable, seeing there was not forty years' uninterrupted possession, but they had gone and come *pro libitu*; and there being no writ to constitute the thirlage, nor sentences nor other compulsitors, the possession should be very full and clear. And, accordingly, this case being advised on the 16th of December, the Lords assoilyied them from the thirlage; finding no constitution of it, either in the charter of the dominant or servient tenements, nor by bonds of thirlage, sentences, seizures, and interruptions *via facti*, nor so much as Acts of Court. See Stair, *12th December 1673, Pittarow*; and the other cases in his Index, *voce Thirlage*. But, on a bill of Alexander's, read by the Lords on the 23d of December, when the Session was up, and when they were only meeting about the cleansing of the streets, and their other public business, they stopped extracting of the decreet absolvitor till the 16th of January: and on that day, upon his allegeance, that, in the register of the Abbacy of Newbottle, in my Lord Lothian's custody, there were decreets of thirlage or Acts of Court, they granted a diligence for recovery thereof; though he was pursuer, and should come *paratus*, and know his author's rights, and not seek new diligences and propone new allegeances in a concluded and advised cause. *Vol. I. Page* 486.

1687. *December* 2. ROBERT and JAMES CLELAND *against* JAMES ROME and ANDREW IRVING.

THE case of Robert and James Clelands, against James Rome and Andrew Irving, was reported by Carse. It was a competition between the rebel James Weir's assignee, and the donatar to his escheat. The assignation is for satisfy-

ing a debt contracted prior to the Rebellion, but is dated posterior thereto. And the assignee also has an arrestment, but does not pursue on the arrestment, but on the voluntary assignation; and obtained a decreet. After this, Rome is made donatar to the escheat, and obtains a general declarator; and then alleged for preference, there was *jus quæsitum regi et fisco* by the denunciation, after which the rebel could not, by any voluntary assignation, denude himself of the right of this debt, though it was not then gifted: and though he had an arrestment, yet it was not insisted on: and that it was so decided *in terminis*, *14th February* 1678, *Sir William Purves* against *James Deans*. ANSWERED,—The King never excluded the diligence of creditors if there was a donatar made; as was clear from Dury, *24th February* 1687, *Pilmuir*; and Stair, *19th February* 1667, *Glen*; and he conjoined his arrestment here, though he had not made use of it, because his debtor had given him an assignation.

The Lords demurred much, if an assignation after rebellion ought to have the effect and privilege of a legal diligence by arrestment; and therefore ordained that point to be heard in their own presence.——But here the assignation was not merely voluntary, but to satisfy the debt for which the arrestment was laid on.

And this cause being fully debated, (anent which, see Stair, *19th December* 1676, *Grant*;) the Lords, on the 17th December, advised it; and, following the President's opinion, they preferred Robert Cleland, the assignee, to James Rome, the donatar of escheat: but if the donatar allege, on the Act of Parliament 1621, that James Weir, the party denounced, was insolvent the time of granting the assignation, or that the debt due to the assignee before denunciation was not just and lawful, ordain the parties to be heard thereanent. And Robert Cleland qualifying, that though there were hornings against Weir, yet he had not fled, and had paid after it L.100 sterling to Mr David Scrimzeor, and so was in credit; therefore the Lords repelled the reason of reduction upon the Act of Parliament 1621. *Vol. I. Page* 486.

1687. *December* 2. WILLIAM KEAPPIE *against* JOHN DICK.

The case of William Keappie against John Dick, metster in Leith, was reported by Drumcairn. The Lords turn the bailie of Leith's decreet into a libel, because it was pronounced in vacance without a dispensation, and they had refused to admit the intrinsic qualities of his oath; and therefore reponed him to his oath. *Vol. I. Page* 487.

1687. *December* 3. The HERITORS of ACHTERDIRAN *against* BOSWELL of BALMUTO.

BOSWELL of Balmuto's case was debated. He being patron of Achterdiran

kirk, and having taken L.1000 Scots from one Mr John Wood, for presenting him, on the death of Mr Thomas Kininmonth, the last minister, under the pretext of giving him liberty of dwelling in the manse, which was said to be the patron's own house: this was complained upon by a bill, 1*mo*, as *velata et palliata Simonia*; 2*do*, That the manse was the minister's, and was no more the patron's than all the rest of the heritors' who contributed to build it.

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1687. ARCHIBALD HYSLOP'S CHILDREN *against* ROBERT CURRY and MRS ANDERSON.

June 21.—THE Children of Archibald Hyslop, stationer, give in a petition to the Lords, against Robert Curry, their step-father, craving that the goods and books in their mother's shop and warehouse, (she being now dead,) may be inventaried and sequestrated, till he find caution to make them forthcoming to any that should be found to have best right. And he having alleged, that he could not be thus summarily dispossessed; the Lords refused the bill, there being no process.

Whereupon two actions being raised before the Commissaries against him, and he having advocated, there was a new bill given in against him, bearing, that he had advocated their actions depending against him for exhibition of writs, and for count and reckoning with the inventary of their father's testament, confirmed by their mother, wherein he was cautioner for her, and was embezzling all, and had advocated of purpose to delay, without any pretence of iniquity done: and though, before a process, the Lords would not put him to find caution, yet now it was just: or else craved that they would discuss it summarily.

The Lords ordained him either to find caution, or to answer summarily; and named Castlehill auditor. *Vide* 3d December 1687. *Vol. I. Page* 457.

December 3.—Archibald Hyslop's bairns, mentioned 21st July 1687, gave in a bill against Mistress Anderson, their aunt, bearing, that, in their mother's lifetime, Robert Curry, their step-father, delivered to her a bond of 6000 merks for their use, and in their name; and that she, through collusion, had delivered it back to him since their mother's death, and thereby had prevaricated, and betrayed the trust reposed in her; and so was liable to them *in damnum et interesse*, if she did not deliver them that bond, seeing *quæ dolo desiit possidere pro possessore habetur*: and though, in her oath, she adjected this quality, That she took it not from him in these terms, not to give it back to him when he sought it;—that was contrary to the nature of the depositation and trust for their behoof.

The Lords ordained her either to produce the bond, or to be liable for the money. *Vol. I. Page* 487.

1687. *December* 7. JOHN LAUDER *against* JOHN ROBERTSON.

JOHN Lauder, chirurgeon-apothecary, having charged Mr John Robertson, portioner in Tranent, on a bond of 1000 merks for a prentice-fee with the suspender's brother; who alleged he would not have bound him, if it had not been in contemplation of his residing in Edinburgh, and that he has gone to Kirkcaldy:—ANSWERED,—The master is best judge of his own conveniency, and where he is best employed; and the boy must follow him, and will get his freedom in Edinburgh notwithstanding.

The Lords, on Redford's report, repel the reasons of suspension, and find the letters orderly proceeded, if it appear, that, notwithstanding of the charger's removal to Kirkcaldy, the suspender will have his freedom at Edinburgh; the charger being always obliged to book the suspender, when the time comes by the custom of the town. And accordingly John Lauder got a testificate from the deacon and brethren of the trade, bearing, that he would get his freedom notwithstanding of the removal out of Edinburgh. Whereupon the Lords decerned. *Vol. I. Page* 487.

1687. *December* 8. The EARL of SOUTHESK *against* SIR THOMAS NICOLSON of TILLICOUTRY.

SOUTHESK's action against Sir Thomas Nicolson of Tillicoutry was reported by Edmonston. This was for repetition of L.500 Scots, which was alleged *indebite* paid by Southesk to Tillicoutry, the defender's father, more than was resting at the time. ANSWERED,—It must be presumed to have been for some preceding terms' annualrents. Which presumption the Lords sustained to stop *condictionem indebiti*, unless Southesk would prove the preceding annualrents were paid *aliunde*. *Vol. I. Page* 487.

1687. *December* 8. The DUKE of GORDON *against* The EARL of ABERDEEN.

THE Duke of Gordon's reduction against the Earl of Aberdeen, was advised; wherein the Duke quarrelled a resignation which he had given the Earl, when Chancellor, of some lands he held of him, to be holden of the King; that so they might not be within the Duke's new regality; and that the Chancellor might consent to the passing of it. The Duke ALLEGED,—It was not read to him, and it was of a different tenor than what was communed on, *viz.* That he should acquire lands of the like value, and take them holden of him; and craved that Priest Dumbar, Mr Thomas Gordon, and other witnesses, might be examined thereon *ex officio*.

The Lords found it only probable *scripto vel juramento*, especially seeing he

had accepted a back-bond from the Earl, which he now kept up, and did not produce. *Vol. I. Page* 488.

1687. *December* 8. BLAIR of DUNSKEY *against*

THE case of Blair of Dunskey and was reported by Balcasky. The reason of suspension was, that the bond charged on was granted for the price of a boat, which was evicted from him; and the charger, though assignee, knew it to be for that cause; and so it was *causa data causa non secuta.*

The Lords found his private knowledge not relevant, nor equivalent as if that cause had been inserted in the bond; reserving his recourse of warrandice against the seller. *Vol. I. Page* 488.

1687. *December* 9. The EARL of SOUTHESK *against* WILLIAM CARNEGY'S REPRESENTATIVES and the LAIRD of BALNAMOON.

THE Earl of Southesk against the Representatives of William Carnegy, writer, and the Laird of Balnamoon, donatar to his escheat. The three points were:—

1*mo*, If it was a sufficient instruction in him as factor, to produce only retired bonds, without discharges from the creditors: which Southesk contended was not enough.

2*do*, If he could crave allowance of debts as paid by him, when he only produces discharges acknowledging the receipt of the money from the Earl, and not from him. He ALLEGED, from their being in his hand, it must be presumed he had paid them. ANSWERED,—He was my Lord's writer and agent, as well as his factor, and so might get them that way.

3*tio*, If he ought to have allowance of counts paid by him for my Lord, where he produces no instruction of the debt, but only the alleged creditor's discharge.

The Lord Boyn, auditor, having reported these points, anent the bonds retired by William Carnegy, without any other instruction of payment of the sums, and anent the discharges granted, bearing the sums to be received from the Earl of Southesk; the Lords find, that these articles being marked, instructed, or allowed by the arbiters in the former count, that the same are now to be allowed, unless the Earl will offer to redargue any of the articles by positive probation; in which case they remit to the auditor to hear the parties upon the grounds of redarguing any of these articles: and sustain the payments of house-maills, and stabler-accounts, unless the Earl will redargue the same.

What moved the Lords, were thir two grounds, 1*mo*, That the arbiters had marked these articles instructed. But this was only, in contradistinction, to allow it, but not to hinder the quarrelling the validity and relevancy of the in-

struction. *2do*, That the Earl used his count-book as a charge; and so behoved to take it *in totum*. But William Carnegy, in his own time, had subjected his discharge to examination.

Southesk having reclaimed against this interlocutor, the Lords ordained him to be heard in presence. *Vol. I. Page* 488.

1687. *December* 14. Sir Alexander Gibson *against* Sir William Sharp.

Sir William Sharp being pursued by Sir Alexander Gibson, clerk, for a debt of his uncle's, Sir William; he produced a letter from the King, stopping all processes against him for his uncle's debt, till he got in what the King was owing him.

The Lords proceeded notwithstanding of the letter, as surreptitious, *et rescriptum contra jus, quod ab omnibus judicibus refutari debet.*

Sir William procured a new letter to the Lords, which was read on the 12th January 1688, bearing, that the Commissioners of Treasury had acquainted the King, that though he had discharged the Lords of Session to proceed against Sir William Sharp of Scotscraig, for some debts of his uncle's, whereon he was pursued by Sir Alexander Gibson, and others, which the King had taken off; therefore his Majesty willed that he should not be troubled; for thir were not the debts for which he had got the assignment upon Orkney and Zetland.

The President was very much displeased at this, as stopping justice; but at last complied; yet would not record the letter. *Vol. I. Page* 490.

1687. The Duke of Gordon *against* Sir Evan Cameron of Lochiel.

February 28.—The Duke of Gordon pursues Sir Evan Cameron of Lochiel for his lands of Mamore in Lochaber, on his gift of Argyle's forfeiture. Thir lands held feu of Huntly for 20 merks yearly, but were not confirmed. Argyle apprised them from Huntly. He being forfeited, Huntly is made donatar by the King in thir lands, and claims the property. Lochiel alleged, That his title could not reach that; seeing all that the Marquis of Argyle apprised from Huntly was only the superiority.

The Lords sustained his title. *Vide* 15th December 1687. *Vol. I. Page* 451.

December 15.—The Duke of Gordon pursues Sir Evan Cameron of Lochiel for his lands of Mamore, as mentioned *ult.* February 1687. Alleged,—You cannot quarrel the defender's right of property in thir lands; because you, by your factors and chamberlains, since your retour of the quinquennial possession, (which is your title to thir lands,) accepted the feu-duties from him, and gave him discharges; and you have allowed it in their accounts: which was found relevant; Stair, *6th June* 1671, *Steill;* and *20th Febuary* 1671, *Earl of Aboyn.* And this also holds in taking rent after a warning.

Answered,—*Non relevat*, unless the Duke had taken it himself, after intenting of this reduction: and cited the decision in 1683, *Burnet, Archbishop of*

St Andrew's, against *Beton of Blebo*, about changing his ward-holding to tax; where the Lords allowed the Bishop to quarrel it, though he had taken the tax-duty.

REPLIED,—There was a disparity; for Archbishop Sharp, who taxed it, was only an administrator, and so could not prejudge the benefice. *2do*, He was a singular successor, and so could not know what his predecessor had done.

The Lords, on Carse's report, in regard of the seeming contrariety of the practics, ordained them to be heard in presence.

The President thought, that, if Lochiel had insisted in his reduction of the Duke's quinquennial retour as to superiorities, he would prevail; for the inquest could never retour him to be in the natural possession of lands, when he got only the feu-duty, which is but *possessio civilis*. See, of this retour, Stair, *23d et ult. July* 1666, *Earl of Southesk*. But, to show the Duke what he was to expect, the Lords decided this point that same day in a parallel case, to make it a preparative. *Vol. I. Page 490.*

1688. *January* 14. PENMAN *against* YOUNG.

THE probation led between Penman the gold-smith, and Young his prentice, is advised. The Lords found the boy had childishly run away from his master, and therefore divided the remanent 800 merks of the prentice-fee yet resting; 200 of it to the master, and the other 100 to remain with the prentice.
Vol. I. Page 492.

1685 *and* 1688. The EARL of TWEEDDALE and LADY YESTER *against* The EARL of LAUDERDALE.

1685. *March* 4.—THE Earl of Tweeddale's action against the Earl of Lauderdale was heard *in præsentia*; wherein he convened him on the passive titles, and as lawfully charged to enter heir, to pay him £10,000 sterling, contained in a bond of provision granted by the Duke of Lauderdale to his daughter, now Lady Yester, and got up from the heirs of James Chalmers, advocate, (to whom it is supposed to have been sent, only to make up a claim in the English time, when his estate was under sequestration, and himself in the Tower;) though he gave her afterwards £12,000 sterling, in his contract-matrimonial with Yester, whereof £5000 sterling is paid. But they had omitted to insert a clause, declaring their acceptation of it in satisfaction of all former provisions; for which they give this reason, that, his estate being disponed to her conditionally, and under redemption, it could not be inserted.

Lauderdale, as charged, offered a renunciation: but seeing he could not propone any defence as apparent heir, and that he was not resolved to suffer this debt to be constituted against the estate; therefore he, as a creditor, (and sundry others of his brother's creditors did concur with him,) offered to debate against it. Tweeddale ALLEGED and contended, that, *in hoc judicio*, where he

was only seeking a decreet *cognitionis causa*, to constitute and establish the debt, no creditor could hinder him; and they had no interest till he came to affect the defunct's estate therewith; and cited a clear decision in Stair, *24th July* 1662, *Alexander Shed* against *Gordon*, where this was so found. ANSWERED,—That case was only where the creditor, by his defence, sought to delay him; so that either himself, or a third party, might, *medio tempore*, come in and do some preferable diligence; but, here, he offered to prove his defence *instanter*, and there was none preventing Tweeddale in diligence.

The Lords found Lauderdale might debate against the debt as a creditor, he proving his allegeance presently, so as not to delay Tweeddale, and producing his interest *qua* creditor; which was as cautioner for his brother.

Then Lauderdale proponed a defence of payment against that £10,000 sterling bond, in so far as the Duke of Lauderdale, her father, having afterwards entered into a contract of marriage between her and the Lord Yester, he thereby, *nomine dotis*, engages for £12,000 sterling, which is more, and so, *præsumptione juris*, is in satisfaction of the other, as the meaning of parties; and cited for this a decision, *13th November* 1624, *Wallace*; and another, *3d March* 1629, *Carmichael*, observed in Dury; and the cases of *Paip* and *Young*, recorded *supra*, *17th January* 1679, and *26th November* 1681; and *22d June* 1680, *Seton* against *Barns*. And with all which Hope goes along, *tit. De Solutionibus*.

Tweeddale opponed other decisions in Dury, *viz. 24th July* 1623, *Stewart and Fleming*; and *20th February* 1639, *Cardross and Mar*; and *l. ult. Cod. de Dot. Promissione*; (yet that law speaks only *de bonis maternis*;) and *Novell. Leonis*, 21, (though that is no canonic text,) where the brocard *debitor non præsumitur donare* ceases *inter parentes et liberos*, and they are all presumed to be *distinctæ liberalitates*; else what needed that clause in our style, to cause children renounce all former provisions.

Yet many things in our style are only *ad bene esse ex superabundanti, et ad majorem cautelam*, and not absolutely necessary. See Scotanus very clear on this, *Examen Juridicum, tit. de Dotis Promissione*. Bonds of provision are granted to children in order to their better settlement and maintenance in marriage; *ergo*, when they are married, it unanswerably follows that these bonds are fulfilled.

Notwithstanding of this debate, the Earl of Tweeddale gave in a bill, showing, that, under the pretence of his being a creditor, Lauderdale could not stop the course of his diligence to constitute his debt of the £10,000 sterling bond, but ought to renounce, that he might adjudge; (now this would force all the other creditors to proceed in like manner, which would heap a fifth part more debt on the estate, and sink it;) and that, by Sir William Sharp's tack of the estate of Lauderdale, he and the other creditors and cautioners were paid, or might have been paid.

And the Lords retracted their former interlocutor, of the 4th of March, and found Lauderdale might probably be paid, and so had no interest to stop Tweeddale here; but reserved his defences, not against the adjudication, but the action of maills and duties.

It was thought a great inconstancy in the Lords to alter thus; especially seeing Tweeddale had, the former day, so far acquiesced as to enter *in causa* and to debate. This was on the 17th March; and Lauderdale gave in a bill against it, anent which *vide* 4th December 1685. *Vol. I. Page 347.*

1688. *January* 19.—Yester's case against Lauderdale, about the L.10,000 sterling bond, mentioned 4th March 1685, is again debated. It was ALLEGED for Yester, that *L. ult. C. de Dot. Prom.* was most just; and that Minzinger tells it was so decided in the Imperial Chamber of Spira; and that her renunciation of her bairns' part of gear and others extended not to this bond; for Gifanius, *de Renunciat.* tells they are *strictissimi juris*, and gives 25 cases where they are to be interpreted and restricted, even against the propriety of words.

The Lords being to advise this cause upon the 26th of January, Yester craved a farther hearing to delay it, apprehending the event; and ALLEGED,—That this L.10,000 bond had an onerous cause to make it subsist, over and above what he got with her in tocher, *viz.* her mother's contract of marriage; and L.8000 sterling which Lauderdale got *stante matrimonio* by way of composition with her, as one of the heirs of line of the Earl of Home.

The Lords, before answer, granted Yester a diligence, to the 19th of February, to recover these papers. And having resumed the case, upon the 21st of February, and advised the whole debate, the Lords repelled the first defence against this bond, upon the not delivery: but sustained the second and third upon the contract of marriage and renunciation: and found, that the L.12,000 sterling of tocher, in the contract matrimonial, fulfilled and took away the said prior bond, notwithstanding of all the adminicles Yester produced *to instruct* the onerous cause of the bond; such as the adventitious fortune which the Duke of Lauderdale got with her mother, as one of the two heirs of line of Home, &c.; reserving to Yester to insist for these debts as accords.

On the 28th of February, Yester gave in a bill, offering to prove the renunciation was extorted from him and his Lady, by the Duke of Lauderdale's power and concussion. But the Lords refused his bill. *Vol. I. Page* 492.

See the other parts of the Report of this case, pointed out in the Index to the Decisions, under *Yester* against *Lauderdale*, and *Tweeddale* against *Lauderdale*.

1688. *January* 20. SIR JAMES COCKBURN *against* ALEXANDER MILN, LORD Ross, &c., Creditors of Hamilton of Grange.

See the prior part of the Report of this case, Dictionary, page 1046. See Harcarse's Report, Dictionary, page 1051.

IN the competition between the Creditors of Hamilton of Grange, debated this day *in præsentia;* it was contended for Sir James Cokburn against Lord Ross, Bonhard, Alexander Miln, and others, that, *quoad* a 4000 merks' bond, he ought to be preferred; because it was granted by John Hamilton of Grange as principal and the Lord Forrester as cautioner; and Sir James, father to the said John, had disponed the estate to the Lord Forrester, under a back-bond that it should subsist for relief of his cautionries. ANSWERED,—The back-bond says only for relief of what he should be engaged in for Sir James.

REPLIED,—It bears, in the narrative, "for the well of the family;" *ergo*, It must extend to his cautionries for John the son, this being profitable *et in rem*

versum. DUPLIED,—It is *pactum merè personale,* and so *non egreditur personam* of Sir James, *per l.* 7, § 8. *D. de Pact.*; and the son John being then an infant *in familia,* no father would grant a security for what debts the child should then contract, seeing he knew not but he might be riotous; and the *ratio S. C. Macedoniani* obviates this: and, *esto* it had been for a debt of Sir James's, yet, that being innovated and extinct by this new bond, it cannot be a security for it; and if it should be a security for Forrester's cautionries for the son, why not for the grandchild also, *et sic in infinitum?*

The Lords found the back-bond taxative only for Forrester's cautionries for Sir James the father; and therefore preferred the other creditors to Cokburn in this sum. *Vol. I. Page* 493.

1688. *January* 25. The EARL of BREADALBINE, and JOHN CAMPBELL, his Son, *against* SINCLAIR of DUNBAITH and DUMBAR of HEMPRIGS.

See the prior part of the Report of this case, Dictionary, p. 10,522.

SINCLAIR of Dunbaith and Dumbar of Hemprigs being, on the 22d July last, found liable in a spuilyie of some horses, pursued by Mr John Campbell; Dunbaith gives in a bill, signifying that these horses were pointed on Hemprigs' horning; and that, on his own horning, some cows were only pointed. Which was sustained, because they were not proven to have belonged to Mr John, as the horses were; nor had Mr John offered to depone thereanent at the market-cross, as he did for the horses; and therefore craving he may be assoilyied from the spuilyie, and the same *in solidum* decerned against Hemprigs. ANSWERED,—*Quoad* Mr John, they must be both liable; because, he having convened both, they did not propone partial defences, but each *suscepit in se litem,* and stated himself contradictory; and an act of litiscontestation is a judicial novation and transaction. And, *quoad* Hemprigs, Dunbaith must also be liable, for he assisted him in the pointing of these horses, the illegality whereof consisted in thir two:—1*mo,* That it was done in the night, or in the morning early, before sun-rising, with violent breaking up of the stable-doors. 2*do,* They refused to take Mr John's oath at the market-cross, and Dunbaith was present, and accessory to both, and got the best of the horses.

The Lords found them both liable to Mr John. *Vol. I. Page* 494.

1687 *and* 1688. JOHN HAY *against* The COUNTESS of HOME.

1687. *December* 14.—JOHN Hay, son to Mr Thomas Hay Clerk, having an infeftment from the late Earl of Home upon the Hirsle, craved, by a bill, that the Lords would appoint padlocks to be put upon the barns and barn-yards, that the corns might not be removed and embezzled. The Countess, his relict,

ANSWERED,—She had right, both as donatar to his escheat and as executrix-creditrix.

The Lords refused his bill *hoc loco*, seeing he might poind. *Vide* 26th Jan. 1688. *Vol. I. Page* 490.

1688. *January* 26.—At Privy Council, the Countess Dowager of Home pursues Renton of Billie, Sheriff-depute of the Merse, for oppression, in granting a summary warrant to break up her barn-doors, that John Hay, a creditor infeft, might poind. Whereas, 1*mo*, He refused to give up the libel to see. 2*do*, John Hay had applied to the Lords for a sequestration of the rents, and was refused, *ut supra*, 14th December 1687. 3*tio*, There was a suspension of multiplepoinding by the tenants depending, and the Lady had both the gift of her husband's escheat and was executor-creditor to him on her contract; and therefore craved he might be punished, conform to the 26th Act of Parliament 1469, and other laws, for his abusing the King's authority (by which he should protect the lieges) to the oppressing of them. ANSWERED,—The point of right ought first to be discussed and remitted to the Session; and John Hay is a preferable creditor to her; and the Sheriff may assist any who implore his aid; and the Lords of Session only declined to meddle with it, as being *mixti imperii*. The Privy Council sustained the libel, and named a committee for examining the witnesses.

And, on the 19th of February, it being advised, the Lords ordained the Lady to be repossessed; but withal appointed her to find caution to refund, if John Hay prevailed in discussing the suspension. But afterwards they took off the necessity of her finding caution, and waved that point about the Sheriff-depute's carriage. *Vol. I. Page* 494.

1688. *February* 1. CROMARTY'S CREDITORS *against* TARBET.

THE case of the Creditors of Cromarty and Tarbet was debated; wherein it was contended, that the roup of a part of the lands upon the 17th Act 1681 is prejudicial to the sale of the rest; because, by this course, a parcel of the best land might be picked out, which would make all the rest sell, and so the rest shall not be got sold.

Yet the Lords found it might be sold in whole or in part as occasions offered; and sustained the partial roup. *Vol. I. Page* 495.

1686 *and* 1688. SIR ROBERT SINCLAIR of STEVENSON, and COLONEL ADAM RAE, *against* SIR JAMES SINCLAIR of KINNAIRD.

1686. *January* 27.—SIR Robert Sinclair of Stevenson, and Lieutenant-Colonel Rae, his trustee, pursue Sir James Sinclair of Kinnaird, as heir to Mr

Thomas Sinclair of Bilbstar, his uncle, for payment of the jointure conditioned by the said Mr Thomas to Anna Foulis, his spouse, in her contract of marriage, and whereof Stevenson has hitherto paid the bygones by some mistake; and, therefore, in this process, is seeking relief, and reimbursement thereof. This being called before Saline, and the pursuer not having insisted, the defender obtained protestation for not insisting. The next week, being again enrolled, it was called before Edmonston; when the defender ALLEGED, he was not obliged to answer, because it was fixed already by a protestation before Saline. ANSWERED,—The design of these protestations was where pursuers calumniously protracted the plea, and put the defender to a long and uncertain attendance; but here there was only the omission in not insisting for one week: and these protestations cannot be granted unless the copy of citation had been produced.

The Lords, on Edmonston's report, found he could only insist before Saline. *Vide* 19th March 1686. *Vol. I. Page* 398.

1686. *March* 19.—The case of Lieutenant-Colonel Adam Rae against Sir James Sinclair of Kinnaird, (mentioned 27th January 1686,) being reported by Saline; the Lords, before answer, ordained, *ex officio*, the oaths of the relict of Mr Thomas Sinclair, and of Sir John Sinclair of Lochend, the tutor's heir, and of Henry Sinclair then his servant, to be taken anent the way and manner of the payment of the sums provided in liferent to the said Mr Thomas Sinclair's relict, and by what cause or title, and out of what funds the same were paid; as also ordain the said persons to exhibit what writs they have, which may instruct that the payers of the sums liferented were particularly obliged to do the same, whereby the defender may be liberated; as also, *ex officio*, ordain the depositions of all other persons whatsoever to be taken, who know any thing of the transactions amongst umquhile Sir John Sinclair of Stevenson, the present Laird of Stevenson, umquhile Sir Robert Sinclair of Longformacus, and the tutors and curators of the said defender, and the said relict of Mr Thomas Sinclair; and to exhibit whatsoever writs they have, to the intent foresaid. And Colonel Rae, by a bill, seeking a conjunct probation as pursuer, the same was refused him. *Vide* 2d February 1688. *Vol. I. Page* 409.

1688. *February* 2.—The case of Sir Robert Sinclair of Stevenson, against Sir James Sinclair of Kinnaird, (mentioned 19th March 1686,) was advised. The Lords found, by continued payments near 40 years, and by the Tutor Longformacus his protestation, That there has been an obligement on Sir John Sinclair, not only to relieve Mr Thomas Sinclair's executors, but also his heirs, (this Kinnaird,) of the relict's liferent annuity; and therefore assoilyied him from this pursuit. Though it was urged for Sir Robert, that 40 years' payment without a title is no ground of prescription to infer a presumptive obligation, especially to liberate an heir who is clearly bound; *tempus* being neither *modus inducendi nec tollendi obligationem sine alio previo titulo*. But the Lords considered that all the instructions of this might probably have been given up at clearing of the tutor-accounts. *Vol. I. Page* 496.

1687 *and* 1688. DOCTOR JAMES WELLWOOD *against* SIR THOMAS NICHOLSON of TILLICOUTRY.

1687. *November* 30.—THE case of James Wellwood, doctor of medicine, against Sir Thomas Nicolson of Tillicoutry, was reported by Kemnay. It was a pursuit for 1000 merks contained in his father's bond. ALLEGED,—He offered to prove, by his oath, that this was never delivered to him in the granter's lifetime, and was blank at the delivery in the creditor's name, and was given him by the Lady, and so must be presumed to have been lying retired beside him, or else to have been subscribed by him *in lecto;* and *instrumentum apud debitorem repertum præsumit liberationem debiti.* ANSWERED,—The presumption *non relevat* to take away his bond, unless they also prove it was lying beside the defunct, and so found by the Lady; else it must rather be presumed she had got warrant from her husband to deliver it to him.

The Lords ordained the Doctor to depone if the bond was delivered to him by the Lady since the debtor's decease; and if it was blank in the creditor's name, the time of the delivery; and allow him to adminiculate the bond, by condescending on the ground of debt wherein he was creditor to Tillicoutry.

On the 14th of December, Tillicoutry having given in a bill, craving the Doctor might be confronted at his deponing with ; the Lords refused him a diligence to cite them, but allowed him to use his own moyen to cause them be present when the Doctor deponed. *Vide* 3d February 1688.

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1688. *February* 3.—Doctor Wellwood's oath in his cause against Tillicoutry, (mentioned 30th November 1687,) being reported by Kemnay, if the quality adjected by him was receivable; the Lords found the services and borrowed money condescended on by him, as the onerous cause of the bond, not sufficient to astruct it, seeing he acknowledges he got it blank from the Lady after her husband's death; unless he *aliunde* prove and instruct the same.

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1688. *February* 15. The CHANCELLOR *against* CHARLES BROWN.

THE Chancellor, as having right to the wards, pursues Charles Brown, son to Robert Brown, stationer, for his ward and marriage, as standing infeft in the ward lands of Wauchop of Gleghornie on a wadset and apprising. ALLEGED,—It is an improper wadset, and he is not infeft on the apprising, and so can be no farther liable than for the annualrent of the money.

Yet the Lords found the contrary, on Harcus's report, *renitente Præside.*

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1688. *February* 15. The LADY BOGHALL *against* The DUCHESS of LAUDERDALE.

THE Duchess of Lauderdale being pursued, by the Lady Boghall, for some jewels in her possession, which were legated to her by the Countess of Lauderdale; and, for her active title, producing a notorial extract of the Countess's testament out of a tabellion's books at Paris:

The Lords found it not probative, unless it were further astructed and adminiculated. *Vol. I. Page* 498.

1687 *and* 1688. M'LURG of BALLANTRAE *against* BOYD of PINKILL.

1687. *December* 10.—A comprising was craved to be reduced, as executed against the debtor at ; whereas he truly then dwelt at Edinburgh. The Lords having taken probation, they found, though he was then at Edinburgh, yet that he had *focum et larem*, and a family where he was cited; and therefore sustained the execution; but prorogated the legal of the apprising till Whitsunday next, if the debtor redeemed betwixt and then. *Vide* 16th February 1688. *Vol. I. Page* 489.

1688. *February* 16.—Mr James Hunter, advocate, and James Cleland, merchant, as creditors to Boyd of Pinkill, gave in a bill, showing, that John Blair, as assignee by M'Lurg, had a comprising on Pinkill, which the Lords had declared should be irredeemable, if it should not be redeemed betwixt and Whitsunday 1688, (as mentioned *supra*, 10th December 1687;) and if Pinkill suffered that term to elapse, they would be cut off: and therefore craved the Lords would allow them, as posterior creditors, to pay Blair, *et intrare ejus locum*, aud ordain him to assign them to his right; which he refused to do, because they would not pay him another sum Pinkill owed him, for which he had no comprising.

The Lords, from a principle of material justice, granted the desire of this bill: which was thought as extraordinary and singular, as the foresaid case of prorogating an expired comprising. *Vol. I. Page* 498.

1688. *February* 17. RODERICK M'KENZIE *against* LORD OXENFORD.

MR Roderick M'Kenzie, of Prestonhall, pursues Lord Oxenford for relieving him of a part of the stipend, and of an augmentation to the minister of Cranston, on a contract between my Lord's father and Hamilton of Preston, Mr Rory's author, in 1622 and 1637.

The Lords assoilyied Oxenford, reserving to MR Rory recourse against Fallahall, his author. *Vol. I. Page* 498.

1688. *February* 21. MAGNUS PRINCE, &c. Tacksmen of the Customs, *against* JAMES CARMICHAEL.

MAGNUS Prince, and other Tacksmen of the Customs, pursue James Carmichael, brewer, upon his contract, to relieve them of sundry debts. ALLEGED, —His agreement bears a mutual obligement that the tacksmen shall pay in to him the excise; *ita est* he wants yet for Thomas Robertson's and Charles Murray's brewings. ANSWERED,—This compensation was not *inter eosdem*, seeing the chargers had paid their excise, and he had action against the deficients.

REPLIED,—They were all bound to him, and it behoved to be understood conjunctly and severally, the words being "they paying;" which is *oratio indefinita æquipollens universali, i. e.* they all paying.

The Lords found them all liable conjunctly and severally for one another's excise; and refused relief till all paid for their brewings, seeing the excise was the only subject out of which he could operate relief.

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1688. *February* 22. JOHN CALLANDER *against* —— RAE and ANDREW FORRESTER.

John Callander, smith, having obtained a decreet against Rae, a barber, and Andrew Forrester, bower, for £1400, as the expenses of the process carried on by the King's Tradesmen against the Town of Edinburgh, for declaring them free of cess and other burdens, as mentioned 20th March 1684, they being bound conjunctly and severally with the rest for reimbursing him:—it was suspended, 1*mo*, Because, by a posterior agreement, they stood only bound *pro rata*. 2*do*, He had lost his expenses by his prevarication in disclaiming the pursuit before the Town Council of Edinburgh; *et mandatarius excedens fines mandati perdit actionem contrariam pro impensis;* and much more if he betray his trust.

The Lords, before answer, ordained the suspenders to depone, whether they knew of the alleged disclamation when they subscribed the last stated account, bearing the obligation on the back thereof, for payment of the total sums therein mentioned; or what time they came to understand the foresaid disclamation: and ordained them to produce the said disclamation. Likeas, they ordained the charger to depone what expenses he truly depursed before the said disclamation, as also what he truly expended after it, upon account of the pursuit; for the Lords resolved to give him no expenses since his disclamation, but only those before.

The Deacon having reclaimed against this, and the Lords having considered his bill with the answers, on the 28th February, they stopped their foresaid interlocutor, and refused to take the oaths of Rae and Forrester, the suspenders, anent their knowledge of the said declamation; which they found has been understood by them in the process before the Commissaries: (the mistake of

this was, that one procurator proponed promiscuously a defence for all the defenders, though all of them did not know of the disclamation, but only some:) and therefore the Lords ordained John Callander to depone upon the verity of the haill articles of his account; reserving to themselves to modify the charges expended by him, as they see cause, because he carried on several other causes of his own under the pretence of this. *Vol. I. Page* 498.

1688. *February* 22. WALTER GIBSON *against* CRAWFURD of CARSBURN.

WALTER Gibson, Provost of Glasgow, his charge against Crawfurd of Carsburn, on an Admiral-decreet, was reported by Collington. The Lords ordained merchants to give their opinion, whether, if a ship be sold where the buyer undertakes the burden of the outreik, if masts will fall under the notion of outreik, seeing she could not be a complete ship without masts. *Vide l.* 44 *D. de Evict.*; Molloy, *de Jure Maritimo, p.* 194; and Loccenius, *lib.* 1, *c.* 2. *2do*, To give their advice and report what is the custom of the Carribbee islands, of giving gratifications to the governors, that their ships may be declared free; and if the ship bears all or only a third part of it; for which Molloy was cited, *lib.* 2, *cap.* 6. And found no annualrent due for the outreik, and that they were not such *impensæ in navem* as bore annualrent, as victuals, provisions, and bottomry do. *Vol. I. Page* 499.

1688. *February* 28. LADY CARLOURY *against* Her HUSBAND'S CREDITORS.

THE young Lady Carloury having given in a bill for an aliment to herself and children out of her husband's estate;—the Lords gave her £50 sterling. Which was thought very hard, where the estate will not pay the creditors' annualrents. *Vol. I. Page* 500.

1688. *February* 28. SIR ROBERT PRESTON'S CHILDREN *against* His CREDITORS.

THE Children of Sir Robert Preston of that ilk, upon a bill, got a modification, from their father's creditors, of 600 merks for this year, during the dependence of their count and reckoning. *Vol. I. Page* 500.

1688. *February* 28. JAMES KER *against* JOHN GIBSON.

JAMES Ker gave in a bill against John Gibson, his wife's father, showing he

had a process depending against him, on her mother's contract-matrimonial, for her portion; and therefore craved an aliment *medio tempore*.

The Lords refused it *hoc loco*, because she had married without her father's consent; reserving their action as accords. *Vol. I. Page* 500.

1688. *February* 28. CROMARTY'S CREDITORS *against* JOSEPH BRODIE'S RELICT.

THE Creditors of Cromarty objected against the comprising produced by the relict of Joseph Brodie, that it was retired by Cromarty the debtor, with a blank assignation, and he filled up Joseph's name in it, and took a back bond from him, declaring he had got it for security of some money Cromarty was owing to Joseph, and for any other sums he should advance for him; which did extinguish it by coming into the common debtor's hands; and being paid with his money, so that it could not subsist for personal sums and debts for which it was not led.

Yet the Lords found it might be so transmitted. But afterwards, thinking this somewhat irregular, they preferred her, on this ground, That the back-bond did not prove that the comprising was retired by Cromarty.

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1687 *and* 1688. CRAIGIE of GAIRSEY *against* WILLIAM MOODIE of MELSETER.

See the prior parts of the Report of this case, Dictionary, pages 6694 and 4419.

1687. *February* 16.—GAIRSEY against Melseter, mentioned 9th December 1685. The Lords, on Redford's report, examined the testimonies of the witnesses, and appointed the price at which they shall count for the Orkney meal, or chalder of bear, on the malt pundler of Kirkwall, to be L.50 Scots, as the current rate proven *communibus annis*; though Melseter's witnesses deponed on 70, 80, and 90, and Gairsey on 30 and 40; and so the Lords *mediam viam secuti sunt*. *Vide* 20th July 1687. *Vol. I. Page* 448.

1687. *July* 20.—In the debate between Craigie of Gairsey, and William Moodie of Melseter, mentioned 16th Feb. 1687, whether Melseter ought to have deduction of 2 *per cent.*, seeing the wadset was constituted in 1639, when the annualrent was at 8 *per cent.*, and now, since 1649, it is 6 *per cent.*:—ALLEGED,—He ought not; because, being a victual back-tack duty, the price of it is uncertain, and may sometimes fall to be within his annualrents. See Act 251, Parl. 1597, anent victual-contracts.

The Lords, on bill and answers, and Redford's report, refused to allow Melseter deduction of a fourth part of the victual back-tack duty, upon account that the annualrents were cried down from 8 to 6: but ordain the parties to

count for the victual contained in the contract of wadset, at the price of L.50 *per* chalder, since the date of the said contract; and appoint Gairsey to have his annualrent, as it was established by law, during all those years, and only to have 6 *per cent.* since the down-crying of the annualrents.

Melseter, in a new bill, objected a probation led by Mr Archibald Nisbet against Buchanan of Sound, of his victual also lying in Orkney, which the Lords modified to L.72 *per* chalder; and he craved the same price. Yet the Lords adhered, notwithstanding this bill; for that probation was against a minor, who was absent; and much of it was malt and not bear; and it is presently under reduction. *Vide* 9th Feb. 1688. *Vol. I. Page* 467.

1688. *February* 9.—In Craigie of Gairsey's case against William Moodie of Melseter, mentioned 20th July 1687: who tergiversing in the count and reckoning, and refusing to produce the discharges he had; Gairsey gave in a bill, representing it was done in order to be a ground of suspension, and to reduce his diligence of adjudication, on account that part of the sums were paid.

The Lords declared, if Gairsey should deduce any real diligence on the decreet, that Melseter's afterwards proving partial payments should not reduce it; but only restrict it *pro tanto.* But did not declare, if it was suspended, and the decreet turned into a libel, that the cautioner in the suspension should still remain liable, and that he should refound all his expenses; as Craigie sought by that bill. *Vide* 28th February 1688. *Vol. I. Page* 496.

1688. *February* 28.—Melseter, on a bill, stops Gairsey's decreet, obtained 7th February last, on this pretence, that there could be no declarator of the irritancy of the back-tack till the event of the count and reckoning. But the Lords ordained Gairsey (in regard he, being Steward of Orkney, could not come back in June,) to depone what discharges or countbooks he had, and to produce them. *Vol. I. Page* 501.

1688. *June* 1.

Some thought the Lords should have scrupled to sit, because of the proclamation dissolving the judicatories of the Session, &c. But the Lords, justly, would not draw in question their own right. *Vol. I. Page* 505.

1685 *and* 1688. William Seton *against* Sir Evan Cameron of Lochiel.

1685. *January* 10.—William Seton, one of the King's Guard, gives in a bill to the Lords of Session, as commissioners of Argyle's forfeiture, against Sir Evan Cameron of Lochiell; bearing that, where Sir Evan being creditor to Argyle in 5000 merks, he had discovered to them that he was likewise debtor to the said late Earl in a greater sum than that 5000 merks; and, as a reward of

his discovery, he had got an act of the Lords, impowering him to retain and pay himself of the said 5000 merks in his own hands; but the Lords gave William Seton, the pursuer, another creditor of Argyle's in 6000 merks, a right to the superplus of what Lochiel owed Argyle, more than paid himself for his locality; and yet Lochiel was now shifting, and refusing to declare what more he was owing than the sum allocated to himself, and was going out of the kingdom to New-Jersey, and disponing his estate to his son; and so would defraud the said William: and therefore craved he might be cited to depone on what more he was debtor than paid himself, or else to be holden as confessed.

The Lords summarily granted the desire of the bill, and ordained one of the macers to cite him to compear before them as commissioners, and depone. Lochiel gave in a counter-bill, alleging he could not be so convened *hoc ordine*, but *viâ ordinariâ* by a summons. *Vol. I. Page* 330.

1688. *February* 8.—Captain William Seton, craving the extract of his decreet of locality as a creditor of Argyle's, whereby the Lords gave him 5000 merks owing to Argyle by Sir Evan Cameron of Lochiel, which he had discovered himself; and the haill being 10,000 merks, Lochiel got the half of it, *in præmium indicinæ*. The Duke of Gordon having also a right to this sum, the King, by his letter, required the Duke to give Lochiel a discharge of it; whereon Lochiel founded a defence against William Seton. ANSWERED,—There is a *jus quæsitum* to him by his locality, which a posterior letter upon misrepresentation could not take from him; and, they being *socii in this sum*, Lochiel could do no deed to prejudge his colleague.

The Lords, considering that they were only the King's commissioners in this case, to distribute Argyle's estate as he should direct them, he might recal what they had done; and therefore appointed Kemnay and Edmonston to prepare a letter to be sent from the whole Lords to the King, to know his Majesty's pleasure, to whom he would give it; containing a representation of the debate for either party, and their rights. *Vide* 2d June 1688.

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1688. *June* 2.—A letter is produced from the King, in favours of Sir Evan Cameron of Lochiell, procured by Robert Barclay, his good-brother, and Pen, the Quakers, against Captain William Seton, mentioned 8th February last, discharging Lochiell of that debt. Which annulled William's decreet, and was said, by the King's advocate himself, to be against property. But others alleged, the Lords, in the commission dividing Argyle's forfeiture, were but the King's factors and trustees; and so he might ratify or recal what they did at his pleasure. *Vol. I. Page* 505.

1688. *June* 5. ANENT the LIFERENT ESCHEAT of APPRISERS.

IT was debated if the liferent-escheat of a second appriser, not infeft, falls to the King, or to the superior of the apprised lands; seeing, *fictione juris*, if he be within year and day, he is reputed as infeft with the first appriser, and the first appriser's would fall to the superior of the respective apprised lands;

ergo likewise the second. But it was thought that the King's right would preponderate this fiction. *Vol. I. Page 505.*

1688. *June 5.* DOES A SUSPENSION STOP REAL DILIGENCE?

IT was queried if a suspension stops apprising, adjudging, and other real diligences; for it will stop a poinding, *ergo etiam* apprising: for poinding, or a search for moveables, must precede apprising. Some say this search is only *moris gratiâ*. Yet this answer seems not to be good; for if the messenger finds moveables to the value, he ought not to proceed to the apprising of lands; seeing the common law, as well as ours, has determined this rational method, that how long a debtor's moveables are able to pay, no distress shall be granted against his lands; and some conclude, that the suspension should bear a stop to real, as well as personal execution, otherwise it does not hinder real diligence. Others think that stop is implied, though not mentioned.

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1688. *June* 6. JAMES CUNNINGHAM *against* JAMES ANGUS.

THE case of James Cunningham against James Angus was advised; and the Lords found Cunningham the charger's oath did not prove the reason of suspension referred thereto, anent the price of the tyle at two merks the gilder; and find the same proves not the second and third articles of the account referred to the charger's oath: And suspend the letters *simpliciter*, for the sum of L.18: 14s. Scots, as the price of the tyle brought home by the suspender, and L.24 Scots, contained in the precept produced: and find the letters orderly proceeded for the rest of the sums charged for, principal and annualrents: and suspend the letters *simpliciter* for the penalty. Angus reclaimed against this, ALLEGING,—That the charger had deponed on sundry particulars not referred to his oath; and which needed not, seeing his acceptance of William Hay's precept did bind it on him; so that he cannot now return it back upon Angus.

This point was referred to Drumcairn. *Vol. I. Page 505.*

1688. *June* 6.

THE Justice-Clerk reported this case. One living in the West, is decerned, by the commissary there, to repair another's honour, whom he had defamed, by appearing in the church and craving him pardon before the congregation. He presented a bill of suspension, that he, being a Presbyterian, had taken the benefit of his Majesty's toleration, and so could not be forced to do penance in

the church, whither he had not freedom to go, but should be remitted to the meeting-house.

The Lords repelled his reason of suspension, and ordained him to satisfy in the church. *Vol. I. Page 506.*

1688. *June* 12. MARGARET SETON *against* MARGARET CRAIG.

THE case of Margaret Seton against Margaret Craig, being advised, the Lords found Craig's uplifting the annualrents of her brother's part of the sum, in the town of Mussleburgh's hands, did not infer a general passive title against her, as heir to her brother, but only *quoad valorem*, for restitution, and for affecting her brother's part, seeing she had a probable ground.

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1687 *and* 1688. RICHARD CUNNINGHAM *against* The DUKE and DUCHESS of HAMILTON.

See the first part of the Report of this case, Dictionary, page 12,328.

1687. *July* 14.—IN Richard Cunningham's case against the Duke and Duchess of Hamilton, mentioned 18th March 1686:—it was ALLEGED,—This being a debt of Duke James's in 1637, and the present Duchess, his daughter, having the estate, not as heir of line to him, but as heir of tailyie to Duke William, her uncle,—his heirs of line must be first called, and discussed; seeing they condescended on a subject of discussion, *viz.* the Lady Southesk is infeft as heir served to Duke William, her father, in the barony of Innerwick.

ANSWERED,—This is a dilator defence after peremptors of payment were proponed, and after acts, commissions, and reports in the cause, and witnesses led on presumptions of payment.

REPLIED,—It was already proponed, but received no answer; and so, not being repelled, is yet entire; and the acts are only before answer. And whereas it is alleged, that it is needless to call the Lady Southesk, seeing she will allege that the heirs of line of Duke James are bound to relieve her; it is answered, —There is another daughter of James's yet uncalled, *viz.* the Lady Cassilis: and the Lords found co-heirs behoved to be called, Stair, *24th January* 1672, *Laird of Lusse*, where they would not so much as allow the heir of line to be called *incidenter* in the same process.

The Lords here found the heirs of line to Duke William behoved to be both called and discussed, ere the present Duchess (who is heir of tailyie,) be obliged to answer; but allowed an incident diligence for citing them in this same action, in regard that defence got no answer before by the act. *Vide* 13th June 1688. *Vol. I. Page 466.*

1688. *February* 24.—Richard Cunninghame's action against D. Hamilton being called; the Duke craved that Sir John Dalrymple, who was not yet ad-

mitted a Lord, might be allowed to plead for him. The President told him that could not be done, he being now entered on his trials. The Duke contended, that Sir John Gilmore had pleaded for his son-in-law, Sir John Nicolson, after he was President. But that was because he was declined from udging in it; so the cases were not alike. *Vol. I. Page* 500.

1688. *June* 13.—The case of Richard Cunningham, and the Duke of Hamilton, mentioned 14th July 1687, was decided; and the Lords sustained the adminicles and presumptions adduced by the Duke, as sufficient to instruct, that either there was no real debt, or, if there was, that it has been paid, or included in posterior bonds and transactions betwixt them.

A bill was given in against this, and the Lords refused it, unless they adduced other qualifications to fortify and astruct the bond, than what were already made use of in the decreet.

Thus the Duke did not lose all his causes, as he pretended.

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1688. *June* 16.

It was debated, if bygone annualrents of a sum in a decreet, bear annualrent after denunciation, as well as the principal, by the 20th Act 1621. Stair affirms it, *tit.* 10, § 75; and there is a decision for it, 31*st January* 1663, *Carberry*; and, after apprising, annuals bears annuals. Yet some doubt of this, because *anatocismus* is prohibited by law, though annuals may be accumulated by paction into a principal by bond.

2*do*, *Quæritur* whether a wife be bound to stand to tacks set by her husband of her liferent-lands, not for an elusory duty, but even to the full avail, whereof there are years to run at his death and her entry; seeing a tutor's tack expires with his office, and she may desire to possess the lands herself; and, like a ward, the tack should sleep till it end. See Craig on this point.

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1688. *June* 28. Mary Kirkpatrick and James Home *against* Sir Robert Grierson of Lagg.

The case of Mary Kirkpatrick and Mr James Home, minister at Kirkmahoe, her husband, against Sir Robert Grierson of Lagg, was debated and advised. John Kirkpatrick being debtor to the said Mary, his sister, in a bond of 2000 merks; and having an infeftment for 7000 merks in Jarden of Applegirth's estate, he dispones it to Lagg, on his back-bond, that he had received the said disposition for 2000 merks of debt, which John was owing him, and for security of what farther sums he should pay out for him. Mary inhibits John, her brother, on her bond; after which, Lagg takes a discharge from John of his back-bond, and transacts and acquires a right to sundry others of his debts; and Mary having adjudged her brother's right to the 7000 merks, and pursu-

ing for mails and duties, Lagg competed for preference on his absolute disposition,—his back-bond being discharged, or at least for all the debts he had paid of John Kirkpatrick's. ALLEGED,—He was *in mala fide;* for John was inhibited by her before the discharge of the back-bond; and, by the Act of Parliament 1621, as John, the debtor, could not prefer other creditors to her who had done diligence by inhibition, so neither could Lagg his trustee and cousin do it. *Vide l.* 7 *D. Quæ in fraud. creditor;* and Sir George M'Kenzie's observations on that Act; Stair, 8*th January* 1669, *Newman*; 24*th July* 1669, *Fleeming*; and *supra*, 23*d November* 1687, *Lord Ballenden.*

ANSWERED,—The inhibition not being intimated to Lagg, (as the Act of Sederunt, 19th Feb. 1680, requires,) he could not be *in mala fide* to take a discharge of his own back-bond, or to transact with John's creditors; and the inhibition is null, being executed at the wrong market-cross.

REPLIED,—He should have searched the Registers; and, *esto* the inhibition were wrong executed, yet it has the effect of a diligence to affect the right, on the Act of Parliament 1621, though it would not reduce posterior rights.

The Lords found the said Mary preferable upon her diligence to Lagg, except in so far as concerned his 2000 merks, and any debts he was cautioner in, or had transacted, before the inhibition. Lagg gave in a bill against this.

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1684, 1687, *and* 1688. The DUCHESS of LAUDERDALE *against* The EARL of LAUDERDALE.

1684. *January* 15.—THE affair of the Duchess of Lauderdale against the Earl of Lauderdale, was reported by Edmonston; and the Lords found her factory (for she was out of the kingdom *animo remanendi,*) to the deceased Edward Masters, and Hugh Ross, yet alive, was not sufficient, the witnesses not being designed in the body, conform to the — Act 1681; and would not sustain the offer made by the Duchess's procurators, to produce a valid factory, *cum processu,* within two weeks, but *ante omnia* required one. *Vol. I. Page* 260.

1687. *August* 29.—The Duchess of Lauderdale pursues the Earl of Lauderdale for a riot, for dispossessing her, and taking away the keys of Lauderdale's castle, whereof she was liferentrix by tack. ANSWERED,—By an inventary of papers produced by herself on oath, in Yester's exhibition *ad deliberandum* against her, it appears she had renounced the liferent of the house, and he had a right from the creditors. *Vol. I. Page* 473.

1688. *February* 24.—The Duchess of Lauderdale seeking an adjudication against the Earl, for the English debt whereof he is bound to relieve her, and calling it summarily amongst the acts, without giving it out to see:

The Lords (though there were prior adjudications, which case only dispensed with the course of the roll, and no more,) ordained it to be seen and returned *in communi forma.* *Vol. I. Page* 499.

1688. *June* 29.—The Duchess of Lauderdale's charge against the Earl, was reported by Tarbet; but she, not being satisfied, obtained a hearing in presence. So it was debated and decided on the 11th of July. This was a charge on the

Earl's ratification, mentioned 1st December 1686, to purge the lands and moveables disponed to her, of all incumbrances, conform to a condescendence given in: 1*mo*, To pay 46 years bygone feu-duties of the lands of Duddingston, disponed to her by the Duke, due to the Lord Roxburgh, as Lord of the erection of the Abbacy of Kelso, of which they held, and whose minority made the years above 40 to be due. 2*do*, To procure renunciations of two infeftments of annualrent lying upon these lands. 3*tio*, To purge Stephen Thornlie's comprising of the lands of Lethington and others, disponed by her husband to her. 4*to*, To free the moveables of the Duke's funeral charges, contained in a decreet obtained by Edward Masters, extending to £5000 sterling. 5*to*, The Earl being found liable to relieve her of the English debt, *supra*, 12th February 1687, she craved he may pay two mortgages upon the lands of Ham, due to the Lord North, extending to £7000 sterling. ANSWERED,—That the Duke having bought the lands of Duddingston, with the burden of these debts, and having, by a most exorbitant donation, disponed them to his Lady, it must be strictly understood to be no farther than *talis qualis*, as he had them.—But his disposition to her, containing absolute warrandice, did cut off this. 2*do*, He could not be liable to warrant against Thornlie's debt, unless it were instructed: and the seasine produced is not sufficient; as was found in her own case against Barnton, in making up Anderson of Hill's comprising. 3*tio*, As to the moveables, they are the natural subject out of which funeral charges use to be paid: and she, having got the moveables, ought to defray that charge; else it should be like the Ægyptian slavery, who tyrannically exacted brick, though they did not furnish straw; and therefore, she having got the straw, ought to make her brick therewith. 4*to*, The Earl's ratification bears, to relieve the heritage and moveables of all debts; which can be only interpreted of such as were *in rerum natura* at the time of subscribing of the ratification; which the funeral charges were not,—his brother, the Duke, being then alive. And, as to the mortgage, *non constat* that the right flows from the Duke, her husband; and therefore they are not bound to warrant it.

The Lords found, if she only craved a general ratification, that she needed not instruct the incumbrances; but, if she insisted for particulars specially condescended on, she behoved to instruct the same: but found the first three articles of Duddingston and Thornlie's debts sufficiently instructed, and decerned the Earl to purge them, betwixt and Candlemas next: but found him not liable for the funeral charges. And, as to Sir Francis North's English mortgages, found she ought to produce a right to these lands of Ham, from her Lord; seeing these incumbrances were not granted by him, but by herself.

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See the numerous other parts of the Report of this case, pointed out in the Index to the Decisions.

1688. *July* 3. DUNDASS of ARNISTON *against* MITCHELSON of MIDLETON.

BOYN reported the competition between Dundass of Arniston and Mitchel-

son of Midleton; and the Lords preferred Midleton's right, his confirmation being before their decreet of poinding of the ground, and their first seasine not containing the specific lands. *Vol. I. Page 509.*

1688. *July 5.* ANDREW URIE, Minister at Morningside, *against* ROBERT ANDREW.

THE case of Mr Andrew Urie, minister of Morningside, against Robert Andrew, mason there, being reported by Balcaskie; the Lords allowed those articles of the account expended by Mr Andrew, the charger, in registrating the minute of contract, and raising letters and using execution thereupon; he giving his oath that he truly disbursed the money; and appoint the charger to give his oath of calumny, if he called for the sum mentioned in the count, and kept the same in his hands, in order to the implement of the minute, and how long he kept the same in his hands. *Vol. I. Page 510.*

1688. *July 11.* SIR ALEXANDER GILMOR *against* CAPTAIN STRATON.

SIR Alexander Gilmor of Craigmiller pursues Captain Straton, for reduction of a bond of 2000 merks, as being for money lost at cards. The Lords, upon Straton's oath, found only 31 guineas of it fell precisely under the 14th Act of Parl. 1621, and ordained him to pay it to them, for the use of the poor, except £5 sterling, which, by that law, he may retain. The rest was lost by packing; so that is also *prodigo et perdituro credere, contra legem ad S. C. Macedonianum.* *Vol. I. Page 510.*

Craigmiller got it not, but had the pleasure to see part of it evicted from Stratoun. *MS. No. 992, p. 412.*

1688. *July 12.* The GIRDLEMAKERS of CULROSS *against* The LAIRD of VALLEYFIELD and his FEUARS.

THE debate betwixt the Girdlemakers of Culross and Valleyfield is reported by Mersington. The former, by their declarator, craved Valleyfield, and all others, might be discharged to make any girdles; in regard, by a letter of King James the VI. in 1599, and a gift from King Charles the II. in 1666, the sole privilege was given to them, for their encouragement; they being the first inventors. ANSWERED,—This resolved into a downright monopoly; which is prohibited, *l. unic. C. de Monopoliis;* and the most that ever was done, was to grant temporary ones, but not perpetual; see the case of *Sir Geills Mompesson,* in Rushworth and Baker; for they are against public utility: and the defenders were feuars to Valleyfield, whose lands were erected into a barony;

and, by a charter in 1662, before their gift in 1666, he had the privilege of keeping girdle-smiths, [*craticularum fabros;*] and that every burrow or Baron might set up what tradesmen or artificers they pleased, it being a natural consequent of the liberty of the subject, and the reward of virtue and industry, to improve trades, and hinder extortion in prices, *ubi vivitur ingenio;* and King James's letter is only to stop unfreemen to work within Culross, otherwise any corporation might get a gift to hinder all others within Scotland but themselves.

The Lords, before answer, recommended to Drumcairn to take trial if the girdlemakers of Culross have any other trade or craft than that of making girdles, and at what prices they sell the same; and likewise to try if the men in Valleyfield do make sufficient girdles, and at what prices they make the same, and if they have any other trade than making of girdles; and if they were in use of making girdles before the resignation whereupon Valleyfield's charter proceeded. *Vol. I. Page* 510.

1688. *July* 12.

The Chancellor gets a new signature from Court of all his lands, erecting them into a regality, and enlarging the bounds of his stewartry, taking in sundry lands belonging to the Marquis of Athole; which creates farther animosities betwixt the two families. *Vol. I. Page* 511.

1687. JOHN DONALDSON *against* JOHN CARNEGIE.

1687. *February* 9.—The case of Donaldson against Carnegie, Provost of Forfar, was reported by Boyne. This was a subsidiary action for paying a debt, for suffering Lyon of Cossins to escape out of prison. ALLEGED,—That, by a probation led in a process against the messenger before the Lord Lyon, it appears to be proven, that he had taken money to let the rebel escape; and so the Provost ought to be assoilyied. ANSWERED,—He opponed the messenger's execution, by which there was *jus quæsitum* to him, which could not be taken from him.

The Lords ordained the pursuer to fortify and adminiculate his execution by the oaths of the messenger and witnesses, but prejudice to the defender to insist against the messenger for the debt on his malversation, as accords. *Vide* 11th June 1687. *Vol. I. Page* 446.

1687. *June* 11.—John Carnegie, Provost of Forfar, being pursued by John Donaldson in a subsidiary action for paying the debt, as mentioned 9th Feb. 1687; the Provost gave in a bill, craving a joint probation as to the manner of the rebel's escape, seeing he offered to prove that the messenger, by bribery and collusion, had suffered him to escape. The Lords granted a mutual probation. And thereafter Donaldson bringing in the witnesses to the execution of caption, to depone that the prisoner was wanded, and offered to the Provost

to be incarcerated, and accepted by him; Provost Carnegy gave in a new bill, bearing, that, if his probation were taken, it would appear that thir witnesses were the contrivers of his escape, and took money, and so were art and part; and therefore craved a commission to my Lord Carse to examine both parties' witnesses at Forfar, (which is near his own house,) in the next vacance, and to consider and try the objection against the hability of thir witnesses, in case it appeared that they were suborned. Which desire the Lords, on the 17th June, granted. *Vide* 14th July 1688. *Vol. I. Page* 456.

1688. *July* 14.—Donaldson's action against John Carnegy, Provost of Forfar, mentioned 11th June 1687, is advised. The Lords find the Magistrates of Forfar liable, and decern, in regard of the messenger's execution, which they sustained, especially being adminiculated by the instrumentary witnesses: and also find them liable for the annualrent, notwithstanding of the decision *29th June* 1626, *Haliburton;* because there the annualrent was only due *ex lege et via actionis;* but assoilyie the Town from the penalty of the bond.

And, on a bill given in by Provost Carnegy against Stewart the messenger, craving they would find him liable to relieve them, because he suffered the rebel, by his connivance and corruption, to escape; the Lords declared they would review the probation, how far it touched the messenger. But he gave in a condescendence of the prevarications of the witnesses who had deponed against him, to alleviate and nullify their testimonies. And at most this would only infer William Carnegy's debt against him, but not Donaldson's.

Vol. I. Page 511.

1688. *July* 17. STEWART of ROSSYTH *against* The EARL of ANNANDALE.

STEWART of Rossyth pursuing the Earl of Annandale for a cautionry of his father's for the Earl of Home; and, to prove payment of the bygone annualrents, Annandale producing a fitted account, it was ALLEGED,—The account related to two bonds wherein Annandale's father was bound; and so the article could not be totally defalked off this bond now pursued on.

The Lords, in regard the other bond could not be produced, to know what sum it contained, they made them equal, and ascribed the half to this bond, on the presumption of law, that, where a thing is indefinite, it resolves into an equality. *Vol. I. Page* 511.

1688. *July* 18 *and* 19. CLELAND and PATERSON *against* WILLIAM WILSON.

CLELAND and Paterson, two messengers, pursue a reduction and improbation of William Wilson's rights on a tenement in Edinburgh, wherein the Lords had found, before, that, if two comprisings be led for the same debt, the second is a passing from the first, at least to the effect of keeping its legal from expiring. A decision in Dury, *14th December* 1621, *Faldonside*, was opponed. It was also urged, that, *quoad* bygones, he had *titulum putativum*;

and so, being *bona fide possessor*, he could not be countable, but only since the date of the interlocutor finding him liable.

Yet the Lords, on Carse's report, find that the defender must count for the sums contained in the first apprising, and conform to the whole rental since his possession, in the terms of the former deliverances, and act of count and reckoning; and assoilyied from the reduction.

Vol. I. Page 512.

1688. *July* 20.

THE Lords found a subsequent Sheriff-depute could not discharge a fine imposed by a former Sheriff-depute, but that it belonged to his predecessor.

Vol. I. Page 512.

1688. *July* 21. MAXWELL *against* LAWSON of BEARCROFT.

THE case of Maxwell and Lawson of Bearcroft was decided. It was a removing, against which the exception was; I have a comprising of thir lands: and it being objected, that they were not expressed in it, they offered to prove they were part and pertinent of the lands apprised. And, for eliding it, it was ALLEGED, they were known to be *distincta et separata tenementa* by several appellations, lying in sundry parishes, and holden of divers superiors.

It was unnecessary to burden themselves with all this *ad victoriam causæ*. But, however, a joint probation was allowed; and, writs and witnesses being adduced, the Lords, on advising them, found part and pertinent not proven: and therefore decerned in the removing.

Vol. I. Page 513.

1688. *July* 21. The MAGISTRATES of ARBROATH *against* JAMES CARNEGY of NEWGATE.

THE Magistrates of the Town of Arbroath pursue James Carnegy of Newgate for purprusion, by incroaching on their marches, whereby he had lost his feu. ALLEGED,—Thir lands holding burgage, the Town was not his superior, but the King, whose bailies and commissioners they were; and so the benefit and casualty of the forfeiture did not accresce to them, but to the King. And he had turned popish to get a gift of it.

Vol. I. Page 513.

1688. *July* 21. CONFIRMATION of WEDDERBURN'S TESTAMENT.

IT was agitated where Wedderburn of Gosford's testament should be confirmed: whether at Edinburgh, as the *communis patria* of all Scotsmen dying abroad, (he being drowned at Calis;) or at Dunkeld, within which diocese his lands, and the haill parish of Aberlady, lie. And they contended, that the 88th Act 1426 was only of such who were abroad *animo remanendi*; which he was not, but only travelling with a design to return; and that the domicile is mainly considered: as was found in the late *Earl of Panmuire's case*, who died at Edinburgh, where he had resided six months; yet the Commissary of Brechin carried it, because his family was there. *Vol. I. Page 513.*

1688. *July* 26. WILLIAM LAUDER *against* SIR JAMES DICK of PRIESTFIELD.

THE case of Mr William Lauder, and Sir James Dick of Priestfield, was reported by Mersington. Sir James, being pursued on a ticket, craved compensation on a debt due to him by Dick of Grange, one of Mr William's authors. ANSWERED,—All Grange's interest in the sum was only an arrestment for a debt owing by Captain Andrew Dick to Grange; which, 1*mo*, cannot compete with Mr William's assignation, which is the first completed right by intimation. 2*do*, It is extinct and expired, not being pursued within five years; and, if it transmitted property, then it would fall under the arrester's escheat and testament; and it could not be the first decreet, but the first arrestment, that would give preference; all which is absurd. And a back-bond affects singular successors, as was found *February* 1678, *M'Kenzies*.

The Lords repelled the compensation. But, on a bill, offering new grounds, Sir James got this stopped. *Vol. I. Page 514.*

1688. *July* 26. THOMAS ROCHEAD of WHITESOMHILL *against* HOME of WEDDERBURN.

THE case of Thomas Rochead of Whitesomhill, and Home of Wedderburn, was reported by Carse. The Lords refused to annul the minute betwixt them, on Wedderburn's not performance, in regard he offered yet to fulfil; but modified £500 Scots to Whitsomhill out of the first end of the price, in respect of the delay of performance, and his great expenses. *Vol. I. Page 514.*

1688. *July 26.* AGNES NISBET *against* ISOBEL and ESTER SMITH, and BRUNTFIELD and SCOTT, their Husbands.

See the prior parts of this case, *supra*, page 594.

See the several intermediate parts of this case pointed out in the Index to the Decisions.

MR Alexander Bruntfield and Smith's reduction against Mr James Borthwick of Stow, and his Relict, (mentioned 17th December 1686,) is advised. Probation having been led on a reason of death-bed, the Lords had found it proven; and reduced. It is now contended, that Mr Alexander Heriot's coming to kirk and market, at least his being at a christening after subscribing that disposition, was proven. And it was craved the Lords would review and reconsider the probation.

This was objected against as *pessimi exempli*, and what reflected on the Lords, and might unsecure and cast loose all the decreets *in foro*.

Vol. I. Page 515.

HARVEST VACANCE, 1688.

THE Law occurrents during this harvest vacance to the Revolution in November 1688, are observed by me in a small 4to Manuscript, and so are forborne to be inserted here. But we may count it a surcease of Justice from August 1688 to the 1st of November 1689; for albeit the Session sat during November 1688, yet, by the Prince of Orange's arrival then in England, no business was done, save on a few bills. As for the decisions after the re-establishment of the Session under King William in November 1689; see the continuation of them shortly remarked in other manuscripts beside me. *MS. Page* 420.

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